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COMPARATIVE ANALYSIS OF SOUTH AFRICA, INDIA AND TANZANIA.

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I hereby declare that I have read and understood the regulations governing the submission of Masters in Law dissertation, including those relating to the length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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To my family: Dad and Mum for their vision and unfailing support throughout my

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ABSTRACT

Discrimination is defined as the practice of unfair treatment to one person or group of people less fairly or less favourably than others on the basis of prejudice. It is admitted and agreed that there are marked differences between men and women, discrimination has caused these differences to make women as being inferior and treated less fairly than men especially in the workplace. The paper will examine as to why women still remain substantially disadvantaged and discriminated in the workplace especially in the context of pay disparities between men and women and how to overcome and get rid of the existing discrimination by examining different jurisdictions.

Pay equity struggles have been universal concern ever since both men and women entered the workforce. Women were subject to workplace discrimination which involves pay. Work which was performed by man was considered to be perfect and require more effort and skills than the one done by woman. Even if they could perform same or similar job, that of woman could be counted as not perfect and hence resulted for their remuneration to be different.

In recent years the struggle for pay equity have been raised as more women have entered the workforce and start to demand equality in pay in employment. The question still remains as to why there should be gender difference in payment for same or similar work performed? The work might require same expertise, skill and experience but still discriminate women on the basis of pay.

Women's participation in the labour force has increased, but at the same time their position has not improved in the labour market. In many parts of the world especially developing countries, women's work is more invisible than in the developed countries simply because there is a large number of women working in informal sector, which is not protected by legislations of those countries. Although equal pay and equal opportunity measures potentially increase women earnings and try to reduce occupational segregation but the problem is still there. Different international instruments and even domestic legislations have helped advocate and fight for gender pay inequalities, but so far the problem still persists. Despite ratifications and national equity and equal pay legislation, there still remains a gender-based wage gap.

The paper will examine the position of United Kingdom on pay equity as it has been constantly applied in this country for over years through a variety of theories and instruments and has advanced in fighting for women's rights at international level and considered to be one of the pay equity **laboratory** since different legal approaches have been developed. Due to that analysis it will help suggest what measures should be taken by countries like South Africa and Tanzania which are still young in the fight for gender wage gap. Henceforth the development of more effective equity measures and policies should be advanced by comparative international research which is needed situating equity policy within a larger policy and institutional context.

1. INTRODUCTION

Unequal pay made between men and women tends to be a universal concern. With the view to the whole issues of pay, pay equity became a concern worldwide in 1951 after the Second World War as to the reasons that most women entered in workforce and labour market, whereas even married women begun working outside their home and left their family responsibilities as their second job. That being the concern, the ILO formulated a convention on Equal Remuneration Number 100 of 1951, in order to help confiscate the gap between women's and men's earnings capacity.¹

Gender discrimination at workplace is a persistent reality, and there is nothing new about the oppression of women and their exclusion from employment opportunities.² What is new is the development of global apprehension and awareness about inequality, social justice and human rights, including the right to employment, fair compensation and opportunities for development on the job.³

The wage gap between male to female is considerable high and reflects the fact that women tend to work in female dominated occupations that are low paid even when these occupation involve the same responsibility, effort, and working conditions as the jobs done by male, and they tend to pay less than male performed jobs. Henceforth this gave rise to the theory "equal pay for work of equal value".

The purpose of this research paper is to put the discussion around the pay equity in the historical context and to examine and compare different legislations and institutions with regard to certain issues which have come up with the introduction of pay equity in the labour market.

Chapter one provides for brief overview of historical development of the pay equity, reasons for comparing the chosen jurisdictions, the causes and explanation of gender wage gap and the discussion of the equal pay principle as applicable worldwide.

Chapter two focuses on international background to pay equity, where by the discussion is on different international instruments under the International Labour Organization and the United Nations. Also the researcher will look at the position of United Kingdom on pay equity. I have chosen United Kingdom as one of the country to international pay equity apart from international organizations, this is due to the reason that pay equity has been consistently applied in this country for over 30 years through a

¹ International Labour Organization Report 2003; 48

² Agocs C, *Workplace Equality, International Perspective on Legislation, Policy and Practice*, Kluwer Law International, 2002, at p. ix

³ Ibid

variety of models and it has advanced in fighting for women's rights at international level and considered to be one of the pay equity laboratory since different legal approaches have been developed. Due to this richness of the United Kingdom, it will help give light for advancement of pay equity in South Africa and the two countries compared to which are Tanzania and India.

Chapter three will discuss pay equity in South Africa. Also if there is a difference between pay and remuneration, the concept of direct and in direct pay discrimination is also discussed. In South Africa there are different legislations which advocates for pay equity, which will be discussed and whether there is compliance or relevancy to international instruments by South Africa. There are also pay equity claims discussed on how they are instituted and steps to be taken in equal pay for work of equal value in South Africa.

Chapter four is about the comparative analysis, where two jurisdictions are examined and compared; these jurisdictions are India and Tanzania which are compared with South Africa. the position in India with the concept of equal pay, measures used for determining and also promoting pay equity, legislative provisions on equal pay where different laws will be examined, enforcement of the 'equal pay for work of equal value' principle and see what role do social partners and public sector play in promoting and ensuring pay equity. The position in Tanzania will entail the colonial era that is to say, how women were treated before independence and after independence if the position has changed or not. Also statutes will be examined if they accommodate women's rights and their effect to wage women. If there are any inadequacy in these statutes will also be examined.

It is beyond the scope of this paper to provide a comprehensive picture of how foreign jurisdiction and international institutions deal in detail with the issue of pay equity. The final chapter will briefly summarize main findings of the paper and concludes with a discussion on importance of and emphasize the duty of the legislation and employers and other stakeholders to promote pay equity.

1. 1 Reasons for comparison

The reason behind for comparing these three jurisdictions is that, any legal comparison is necessary for the development of one country's own legal system. Once one jurisdiction is more advanced legally than the other it will help for the later (the jurisdiction which is

not legally developed) to borrow some of the provisions of the law it thinks fit for the problem they face. As it is evident that most of the laws in Tanzania were as a result of colonialists and these laws were brought from India to Tanzania which made these two countries to have similar laws or for Tanzania to follow the trend of laws from India.

For Tanzania and South Africa, there was a task force which was used to develop and shape Tanzania labour laws where some of the provisions and ideas were from South Africa laws which brought about the current Labour Relations Act 2004 and the Labour Institutions Act 2004. These achievements were mainly facilitated by social partners. As due to the reason that the world has become global village through a development in a number of social aspects, it suffices for countries to be compared in legal aspects.

Also both countries are in compliance with ILO Conventions and Recommendations on gender equality, and the South African labour legislations were used as a model by the task force in Tanzania which resulted in the amendment and enactment of the current Employment and Labour Relations Act 2004 and Labour Institutions Act 2004.

Since there have been important developments within SADC countries to review their labour legislation and to develop employment gender equity, it is necessary for developing country like Tanzania to look at what South Africa and India has achieved in promoting gender pay equity at work and suffice to compare these countries.

1. 2 Gender workplace equality

A study which has been conducted worldwide put forward that, inequality in the workplace in different parts of the world has long overdue in this era of globalization. Since 'globalization' has vague and imprecise meaning to anyone who uses it, it tends to mean a development or movement towards diversity in the populations and labour markets of countries across the world. The mounting representation of women in paid employment is a global trend.⁴ Globalization has brought and favoured some forms of oppressions and discrimination at workplace especially to women despite some benefits on the economic, social and cultural life of many nations around the world.⁵

The reason for this study is that women in all parts of the world are unprotected by their employment standards such as legislations, social security benefits and even by

⁴ Agocs C, *Workplace Equality, International Perspective on Legislation, Policy and Practice*, Kluwer Law International, 2002, at p. ix

⁵ Ibid

workers associations and hence they face disadvantage sector of the population and mainly work in the informal and unorganized sectors.⁶

The extent of women's disadvantage in the labour force is frequently used to be measured by the average gender pay gap of which is one of the indicators that is frequently used to measure the extent of women's disadvantage in the workplace. This gender gap is calculated as the female to male average earnings ratio in a given labour market. This ratio varies from country, period studied, characteristics of the groups concerned, and by the definition of the *earnings* variable that is used at that place and time.⁷

Recent studies confirm that this gap exists in developing economies which are in transition and in advanced economies too. At both international and national levels, policy makers recognize the need to better understand the causes of the gender pay gap and to take the necessary measures to eliminate it. The increasing number of studies on the subject bears witness to a growing interest in the causes and continued existence of this gap.⁸

Numerous studies have tried to identify the causes of the gender pay gap in employment, and have shown that part of it results from a number of variables linked to the characteristics of both the individuals and the sectors in which they work. The most high up include; educational attainments, fields of study, work experience, seniority in the company, full-time or part-time employment, and trade union density.⁹

The pay differential between men and women that is due to differences in the abovementioned characteristics do not constitute pay discrimination. Some researchers also include "occupation" among the above mentioned variables. According to them, women's high representation in occupations considered low-skilled, and men's high concentration in more skilled jobs, is taken as a factor that explains a portion of the

⁶ Agocs C, *Workplace Equality, International perspectives on Legislation, Policy and Practice*, Kluwer Law International, 2002 page 1

⁷ Chicha M, 'A comparative analysis of promoting pay equity: models and impacts', accessed at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596, page 3

⁸ Ibid

⁹ Agocs C, *Workplace Equality, International perspectives on Legislation, Policy and Practice*, Kluwer Law International, 2002 page 2

gender pay gap that is related to the labour market structure, and not to pay discrimination.¹⁰ An enquiry of its requirements through a non-discriminatory job evaluation method may reveal a range of qualifications and responsibilities that were previously neglected. Consequently, it is appropriate to suggest occupation as a productivity characteristic only after female-dominated jobs have been re-evaluated.¹¹

1. 3 Types of pay discrimination.

There are two pay discrimination types to be discussed. The first type occurs where people perform same job but they are paid differently, for example a female and male policeman with the same qualifications, seniority and responsibilities. This form of discrimination contravenes the principle of equal pay for equal work and is relatively easy to prove and remedy. It would appear that today this type of discrimination goes hand-in-hand with the entry of women into particular traditionally male dominated jobs.¹²

The second type of pay discrimination occurs when different jobs in content but of equal value, receive different pay; for example when a policeman (male job) earns more than a nurse (female job). This form of discrimination, which conflicts with the principle of equal pay for work of equal value entrenched in ILO Convention No. 100, accounts for the largest share of the outstanding wage gap.¹³

This type of discrimination is difficult to prove and its elimination more difficult to achieve. It is based on a historic feature of labour markets, namely occupational segregation by sex. Even today women are concentrated in a limited number of jobs in which they account for as much as 80 or 90% of the workforce (e.g. secretaries, receptionists, sales staff, cashiers, nursery or primary school teachers) On the other hand, also men are heavily concentrated in particular jobs, although the range of jobs is broader, ranging from senior executives to information scientists, truck drivers and mechanics.¹⁴

¹⁰ Ibid

¹¹ Chicha M, 'A comparative analysis of promoting pay equity: models and impacts', accessed at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596, page , p 4

¹² Ibid, page 5

¹³ Ibid

¹⁴ Ibid

1. 4 Pay and Pay Equity

Pay systems are complex and vary from country to country. Pay can be money or benefits worth money, covering all sides of what a worker is entitled to receive from his/her employer. Pay can be calculated on an hourly, weekly, or monthly basis. Pay can also be determined on a productivity, performance, piecework or gratuity basis.

Pay Equity is a method of eliminating discrimination against women who are paid less than men for the same or similar job performed by them. This goes beyond the familiar idea of "equal pay for equal work" where men and women with the same jobs must be paid equally.¹⁵ A policy to establish pay equity usually means that all jobs will be evaluated and given points according to the level of knowledge and responsibility required to do the job; and that salary adjustments will be made if it is discovered that women are consistently paid less than men for jobs with similar points. But unfortunately practically it is not so, as in many workplaces employers never adjust salary for their workers especially to women.¹⁶

Pay equity always recognizes and acts to eliminate discrimination in pay and employment conditions of women at workplace, recognizes that the jobs done by a majority of women are often paid less than jobs done by a majority of men. Goes beyond equal pay and requires that pay should be equally given to jobs of equal value regardless done by opposite sexes.¹⁷

1. 5 Causes of the gender pay gap

There are different factors which led to the causes of gender pay gap.. Although there may be an interface between these causes that have a growing disadvantageous effect on the situation of women, it is important that specific policies embark upon them individually.¹⁸

It will not be possible to eliminate devaluation by removing what is known as the glass ceiling which is the impediment women face while attempting to gain access to senior

¹⁵ Berger A, *Equal pay for work of equal value: looking at the European Community and the United States of America*, (1998) LLM Dissertation, University of Cape Town

¹⁶ Ibid

¹⁷ Thompson J, *Pay Discrimination: Revisiting the concept and International perspectives*, (1998) LLM Dissertation, University of Cape Town

¹⁸ Chicha M, 'A comparative analysis of promoting pay equity: models and impacts', accessed at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596, p 6

executive posts.¹⁹ While it is true that all of these measures could potentially have an effect on the overall gender pay gap, they cannot however be held entirely accountable for the problem of a lower wage being paid to women for work of equal value.²⁰

It is necessary to make a distinction between the different causes of the gender pay gap if there is to establish legal mechanisms based on appropriate tactics. This weirdness becomes more important when it pertains to pay discrimination, since eliminating it requires a very specific tactic. The mechanism involves an in-depth review of the jobs profiles in an organization, an evaluation of these jobs and of pay practices.²¹

Any confusion between the objectives that different policies aim to achieve not only smudges methodological approaches but also makes it impossible to correctly assess results.²²

1. 5. 1 Explanation for gender wage gap

Human capital justification

“The neo-classical ‘human capital theory’ argues that the wage differential between men and women arises from differing sex-based expectations of labour force participation that led to sex differences in human capital investment”.²³ Potential employee chooses how much time, effort and money to invest in a view to future employment. Women expect to working for a shorter period of their lives due to other family responsibilities than men, and therefore it is economically rational for them to invest less as their standard of work differs. Consequently the average woman is assumed to be less productive than the average man, and this explains the pay differential.²⁴ The behaviour of women with children and family responsibilities at large is alleged to be the key cause of the different pattern of labour force participation.²⁵

¹⁹ Ibid, p 7

²⁰ Ibid

²¹ Ibid, p 8

²² Ibid

²³ The ‘Human Capital Theory’ is explained by Paula England, *Comparable Worth, Theories and Evidence*, New York 1992, at 50- 53; Institute of Development and Labour Law, University of cape town, Kalula E, *Draft Equal Employment Opportunities policy as regards gender for Commonwealth Countries*, at 4.2.1; Sandra Libeson, *Reviving the comparable worth Debate in United States: A Look towards the European Community*, *Comparative Labour Law Journal*, 1995, Vol. 16, pp 358- 398, at 361

²⁴ Richard Townshend-Smith, *Sex Discrimination in Employment*, 1989, at p 1

²⁵ Libeson, *Comparable Worth in the US and EC*, at 362

Occupational segregation

This is alleged to be the main reason for the wage gap between men and women at their workplaces. Jobs which are more female dominated are low paid. Occupational segregation accounts for the sex wage gap by leading to an oversupply of women in a limited number of occupations.²⁶ A lot of female occupations are in informal sectors and extensions of domestic tasks such as cleaning, nursing, cooking, and tailoring. As women's jobs reflect domestic skills which are themselves unpaid and so undervalued, those same skills, when translated into paid work, are equally given lower social status and therefore low pay.²⁷ In addition, sex segregation at workplace contributes extra to the earning gap between men and women. Sex segregation occurs within occupation in a firm or enterprise because within firms men and women in the same occupation may do different jobs regardless of their skills, experience and the like.²⁸

Women's low participation in workers' union.

Participation of women in workers' representation and other trade union is very lower than men's. One of the reasons is that women have less time because of family responsibilities.²⁹ Another reason is that a lot of trade unions and workers participation don't give issues and problems concerning women special attention and priority, because of lack of awareness or because they discard the idea of 'feminist theory'. Women work very often in the informal sector with a very low grade of unionization. With low grade of unionization, women miss chances of raising wages through the power of collective bargaining as they are not protected.³⁰

Social and Cultural factors

Different behavioural studies have predicted that, gender employment discrimination exists in every known society; and in that every society the value put on work reflects the status of those traditionally allocated to that particular work; and also that work identified with women is always considered less valuable than that done by men, regardless they are similar, of its difficulties or its distribution. In every society there is a division of labour,

²⁶ Berger A, *Equal pay for work of equal value: looking at the European Community and the United States of America*, (1998) LLM Dissertation, University of Cape Town, at p 8

²⁷ Ibid

²⁸ Ibid, at p 9

²⁹ Ibid

³⁰ Ibid

and there is no consistency about which job to be allocated to men and which to women, that what classical studies in cultural anthropology have tried to show.

1. 6 The Equal Pay principle

The concept of equal pay seems to be straight forward but its complex in application as one becomes familiar with international perspectives.³¹ Equal pay extends beyond the concept that all employees doing the same or similar work should receive the same remuneration. It suggests that employees should not be discriminated against regarding their remuneration.³² This rule is not without qualification, as unequal remuneration is not unfair per se; however when a difference in remuneration exists, the basis of this differentiation must not be a generalized assumption about the characteristics of a particular group of people.³³

Differences in pay would be justifiable given the basis thereof is productivity, length of service, or skill, but not those differences to base on race, gender, religion or ethnic origin. Therefore employees whether black or white, male or female, if similarly qualified and experienced, and engaged in the same work should not receive different remuneration.³⁴ Another one argued that, discrimination in pay exists when a woman is doing a job which is ranked equal to the job done by a man, and she receives less payment.³⁵

Discrimination entails unequal treatment, and as a result the nature of discrimination requires comparisons. The ILO has indicated that this source of comparison should include work of equal value. Same and similar work as a basis of comparison continues to be most universally accepted, as the concept of “work of equal value” remains controversial. The International Labour Conference however, has reported a sharp increase in countries which have enacted the principle of equal pay for work of equal value.³⁶

³¹ Ibid

³² Thompson J, *Pay Discrimination: Revisiting the concept and International perspectives*, (1998) LLM Dissertation, University of Cape Town

³³ Ibid

³⁴ Van Niekerk, ‘*Preventing and Providing Workplace Discrimination*’ Current Labour Law 1995, at 85

³⁵ Campanella ‘*Equal Pay- The Price of Equality*’ Labour Law News and Court Reports 1993 V4 N5 3

³⁶ International Labour Conference, ‘*Equal Remuneration*’ 72 edition 1986

2. INTERNATIONAL BACKGROUND TO PAY EQUITY

2. 1 International Labour Organization

One of the founding principles of the ILO in 1919 was that of eliminating discrimination against women in relation to workplace and employment related matters. In 1951 after the Second World War (that is a period in which more women entered the workforce; whereas even married women begun working outside their home), with regard to issues of pay that the ILO had to formulate a convention on Equal Remuneration (Number 100 of 1951), in order to help get rid of the gap between women's and men's earnings. So far, this has been ratified by many countries worldwide.

The preamble of the constitution includes protection of women and recognition of "equal pay for work of equal value" as areas requiring immediate improvement. The ILO has a role to play for change, catalyst and advocate of the link between economic efficiency and social efficiency. The organisation approaches gender equality as a matter of human rights, social justice, economic efficiency and sustainable development. The primary goal of ILO is to promote opportunities for women and men to obtain decent work in conditions of freedom, equity, security and human dignity.³⁷

2. 1. 1 ILO Decent work Agenda

The primary goal of the ILO today is to promote opportunities for everyone without discrimination to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. All those who work, women and men, have rights at work. Not only wage workers in formal enterprises, but also the self- employed, casual and informal workers, the hidden, predominantly female workers of the care economy or of the domestic scene.³⁸

The concept of decent work is based on the expressed wish of men and women for work that will allow them and their families to have access to a decent standard of living. Decent work means meeting or exceeding core social standards- setting a starting point for work and employment which symbolizes universal rights, and which for a given society is reliable with its values and goals. The decent work agenda is based on the realities, values and goals of a given society. But it is a dynamic concept the content of

³⁷ ILO, Decent work for women, '*Proposal to accelerate the implementation of the Beijing Platform for Action*', 2000 at p 3

³⁸ Ibid, at p 7

which evolves with social and economic progress of a given country. The agenda puts gender equality and development issues at the heart of the ILO agenda.³⁹

The ILO has a global role to play in setting labour standards which will not be subject to discrimination on any basis. The fundamental principle of the Organization is that every individual at work has rights, so its strong commitment for equality of opportunity and treatment between men and women in the world of work has long been part of its mandate. It is reflected in existing instruments of direct relevance of gender equality.⁴⁰

2. 1. 2 ILO Convention No 111⁴¹

This Convention states that “the terms and conditions of employment (including remuneration) of an individual should not be subject to discrimination on the basis of sex”.⁴² This Convention is particularly important as it dealt with indirect discrimination. This type of discrimination due to its hidden nature has been considered to be more insidious as on the surface, it appears that the criteria for any differentiation are neutral and fair but the effect or result is that woman is discriminated against unfairly.⁴³ These guidelines argued for arising wages in sex-segregated, female dominated jobs, on the grounds that this work had historically been sidelined and undervalued- this undervaluation being a form of discrimination in itself.⁴⁴

Workplace discrimination and any other employment discrimination is generally prohibited by the convention.⁴⁵ It is a broad prohibition of discrimination and specifically defines it as:

“any distinction, exclusion or preference made on the basis of race, colour, sex...which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

³⁹ Ibid

⁴⁰ Ibid

⁴¹ International Labour Organization Convention of 1958

⁴² Hodges-Aeberhard J, *Recent Developments Concerning Equal Pay for Work of Equal Value: An outline of Recent Developments Concerning Equality Issues in employment for Labour Court Judges and Assessors*; ILO, Geneva, 1997

⁴³ Loveday G, ‘Gender Discrimination at the Workplace’ [1997] TSAR 100, at p. 102

⁴⁴ Acker J, *Doing Comparable Worth- Gender, Class and Pay Equity*: Temple University Press; Philadelphia 1989 at p. 6

⁴⁵ Thompson J, *Pay Discrimination: Revisiting the concept and International perspectives*, (1998) LLM Dissertation, University of Cape Town at p 20

2. 1. 3 ILO Convention No 100⁴⁶

The Convention lay down the foundation principle of equal pay between men and women for work of equal value. Article 2 of the Convention requires that it be applied by any combination of national laws or regulations, wage fixing machinery or collective agreement.⁴⁷

The ILO Equal Remuneration Convention⁴⁸ states that:

“Each member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and insofar as it is consistent with such methods ensure the application to all workers of the principles of equal remuneration for men and women workers for work of equal value”.

The Convention provides in extroverted provisions that different states should ensure the application of the principle of “equal pay for work of equal value” by means of appropriate legislation, collective agreements or wage fixing machinery. The convention also calls for the promotion of objective appraisal of jobs on the basis of the work to be performed where this can help to give effect to the equality principle.⁴⁹

The most noteworthy obligation of this convention is to make sure that woman and men not only obtain equal remuneration for the same or similar jobs they perform, but they also receive equal remuneration for *work of equal value*. The convention encourages the development and use of systems that can “*objectively measures the relative value of jobs*” – even though such jobs differ in their operational content and skills requirements.⁵⁰

. The definition of remuneration is very broad extending over and above monetary remuneration. Convention No 100 provides for a ground of comparison of remuneration, that is to say equal value. The ILO further provides guidelines regarding the interpretation of equal value. Clearly it does not simply denote identical or perhaps similar work.⁵¹

⁴⁶ International Labour Organization Convention of 1951

⁴⁷ Hodges- Aberhard J, ‘*Recent Development concerning Equal Pay for Work of Equal Value, Annex to an outline of Recent development concerning Equity Issues*’, ILO Geneva 1997, at p. 35

⁴⁸ Convention No 100 of 1951

⁴⁹ Angela Byre, *Human rights at the workplace; a handbook for industrial relations practitioners*

⁵⁰ International Labour Organization, Report 2003:48

⁵¹ Ibid

The achievement of equal pay for work of equal value, as a fundamental right embedded in the Convention No. 100 that has been ratified by the large majority of countries,⁵² remains largely unattained. The Report entitled *Time for Equality at Work*⁵³ highlights continuing pay discrimination between jobs of equal value and identifies its negative impacts and restates the urgent need to take the necessary steps to eliminate it. In a recent report of the European Commission (2006) deplores the fact that the gender pay gap remains disappointingly wide and does not show any signs of shrinking. These findings are of concern also to governments and social partners in many countries.⁵⁴

2. 1. 3. 1 Significance of ILO Convention No 100

The significance of this convention is the realisation that women earned less as compared to men although they perform same or similar job, had the same qualifications and/or were at the same pay level. There were significant variations in the bonuses, pay rates and overtime rates between men and women.⁵⁵ Most women who are doing part-time and temporary works, have lower wages, fewer contractual benefits, and also because not as many of them occupy positions where such benefits are given, such as managerial and executive positions are predominantly held by men. The Convention also addresses the “undervaluation” of work done by women in order to narrow earnings gap between men and women.⁵⁶

The ILO conventions are agreed by governments, employers and workers. Government's ratify ILO conventions and implement them in national legislation, although they are non-binding to those countries which have ratified them.⁵⁷ There is a process for hearing complaints if a country breaches convention; Trade unions can initiate this process. If a country is a member of the ILO, where it can:

- Campaign for ratification of a convention.
- Once ratified, campaign to fully implement the requirements of the convention.

⁵² Only 16 member countries to date have not yet ratified it

⁵³ International Labour Organization Report 2003: 48

⁵⁴ Chicha M, 'A comparative analysis of promoting pay equity: models and impacts', accessed at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DownloadID=6596, at page 1

⁵⁵ Hodges- Aerbrand, 1997 and Whitehouse, 2004

⁵⁶ Ibid

⁵⁷ ILO Decent Work for women, 'A proposal to accelerate the implementation of the Beijing Platform for Action', 2000

- Take a complaint for any non compliance with an ILO convention.⁵⁸

Though some writers have said that ILO is a toothless dog, as it can hear those complaints brought before it but can not be in a position to punish the member country as these conventions are non-binding to states which have ratified those conventions.

In June 2003, the International Labour Conference adopted the Global Report "Time for Equality at Work". This report is the fourth Global Report under the follow up to the ILO Declaration on Fundamental Principles and Rights at Work. It examined the different forms of discrimination at work that had been identified and formally condemned nationally and internationally.⁵⁹ It gave an update of the various policy and practical responses, with the aim of mobilizing greater support for the elimination of discrimination in respect of employment and occupation.

The Report 'Time for equality at work' argues that the benefits of eliminating discrimination in the workplace surpass the individual and extend to the economy and to society at large.⁶⁰

In addition, the ILO adopted Resolution for Pay Equity in June 2004 calling for governments, social partners and the ILO itself to take a set of specific actions to address the gender wage gap which is the persistent problem in the world today. The resolution also recognises the essential role of quality of public services.⁶¹

Specifically, the resolution proposes that social partners negotiate the introduction of gender neutral job evaluation schemes, statistical indicators, as well as gender and race reviews at the workplace.⁶² It calls on the ILO to strengthen its commitment to gender equality and improve its training and advocacy programmes, as well as research of minimum wages and the provision of public services on the gender, wage gap, taking into account other forms of gender discrimination.⁶³

⁵⁸ ILO Decent Work for women, 'A proposal to accelerate the implementation of the Beijing Platform for Action', 2000

⁵⁹ ILO Report, Time for Equality, June 2003, available at www.ilo.org

⁶⁰ Ibid

⁶¹ Fourth World Conference on Women, Beijing Platform for Action, Beijing, China, 1995, accessed at www.un.org/womenwatch/daw/beijing/platform

⁶² Ibid

⁶³ Ibid

The International Labour Conference adopted a resolution concerning promotion of gender equality at its 92nd Session in June 2004. The resolution calls upon governments and social partners to actively contribute in eliminating all forms of discrimination in the labour market and promote gender equality between men and women as well as dismantle barriers which prevent women from obtaining economic awareness through their labour market participation on an equal footing with men.⁶⁴

The report also appeals to all governments of ILO member states to ratify the Equal Remuneration Convention No 100 and the Discrimination Convention No 111 and introduce or strengthen appropriate legislation, programmes, policies and other measures aimed at eliminating gender discrimination in employment.

2. 2 United Nations

The United Nations prohibition of discrimination with regard to Equal Pay for “equal work” in the United Nations Declarations of Human Rights of 1948 was expanded in later instruments to cover also the broader concept of “equal value”

Article 23 of the UDHR establishes the basic principle that everyone without any distinction has the right to equal pay for equal work.

2. 2. 1 The International Covenant on Civil and Political Rights

The major equality clause in the International Bill of Human Rights is Article 26 of the ICCPR. The covenant came into force in 1976 when it was ratified by 35 countries. It guarantees everyone of equality before the law and requires the law of state parties to prohibit any discrimination and to guarantee all persons equal and effective protection against discrimination on any ground.

The scope of Article 26 is very broad, as it is affirmed by its supervising organ, the Human Rights Committee (HRC). In the general Comment No 18 on non-discrimination the HRC states clearly that Article 26 “prohibits discrimination in law or in fact in any field by public authorities”.⁶⁵ Thus it is not limited to rights which are covered by the ICCPR. The General Comment emphasizes the positive duty to realize

⁶⁴ Ibid, Beijing Platform for Action

⁶⁵ Human Rights Committee, General Comment number 18 on Non- Discrimination available at www.unhcrhr.ch

equal rights for all, which means taking all kinds of measures to achieve this. Such measures may also cover privileged treatment.

2. 2. 2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and creates an agenda for national action to end any form of discrimination against women.

Article 11(d) provides for women to have:

The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

Governments should commit themselves to undertake a series of measures to end discrimination against women in all forms by accepting the Convention. Countries that have ratified or acceded to the Convention are legally bound to put its recommendations and provisions into practice.⁶⁶ They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations and bridging the gap of discrimination against women.

Civil society organisations, including trade unions, workers organisations, can also submit their own reports on CEDAW to the UN. This is another important step on achieving gender equality especially at workplace.⁶⁷ The Convention has the idea of equal remuneration for equal work embedded in it as was introduced by ILO Convention no 100. Moreover it focuses on preventing discrimination in the legal system to ensure equality in all parts of working and public life.

The CEDAW is the most comprehensive convention dealing with women's rights. It contains similar definition of discrimination as the ICCPR.⁶⁸ The broad purpose of CEDAW in striving for more than formal equality is reflected in the provisions which

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Article 1 defines discrimination against women as any distinction, exclusion or restriction, based on sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment and exercise by women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field

require positive measures to improve the overall position of women, and which like the UN Convention on Elimination on all forms of Racial Discrimination, allow for preferential treatment.

It also provides for an obligation to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁶⁹

2. 2. 3 The Beijing Platform for Action.

The Beijing Platform for Action adopted by the Fourth World Conference on Women in 1995 includes the most important commitments made by the international community as far as women's rights and human rights generally are concerned.⁷⁰

The twelve critical areas of concern identified in the Beijing Platform for Action (PFA) are all related to the ILO's mandate. In 1996 the ILO Governing Body set the strategic orientation for ILO follow-up activities to implement the Beijing PFA.⁷¹ Seven of the twelve areas were identified for more focused implementation, which can be summarized fewer than three:

- poverty eradication and productive employment,
- working conditions and social protection
- international labour standards and normative action on women workers.⁷²

2. 3 The United Kingdom Position

The United Kingdom presents conceivably successful implementations sculpt for pay equity. In the UK the Equal Pay Act was passed in 1971, but employers given five years within which to implement the principle. The Act did not therefore come into force until the end of 1975.

UK was also under an obligation to implement 'equal pay for work of equal value' by virtue in its position as a member of the European Community. The community's

⁶⁹ Article 5 of CEDAW

⁷⁰ ILO Decent work for women, 'A proposal to accelerate the implementation of the Beijing Platform for Action', 2000

⁷¹ Ibid

⁷² Ibid

response to the principles of pay equity was initiated in Article 119, it immediately encountered difficulty.⁷³

2. 3. 1 Pay Gap and its existence.

The gender pay gap refers to the difference in average hourly earnings of men and women. The Government is committed to reducing the gap between men's and women's earnings, and making sure that woman's skills are properly used and rewarded as deserved.⁷⁴

The gender pay gap of 12.6% expresses the difference between men's and women's median full-time hourly earnings. This means that women working full time are currently paid, on average, 87.4% of men's hourly pay. Since 1975, when the Equal Pay Act came into effect, the pay gap closed considerably.⁷⁵ The headline gender pay gap figure is derived from median hourly earnings (excluding overtime) for men and women. Mean figures are often not favoured because they can be affected by changes to the earnings of small numbers of very high-earners.⁷⁶ The Government is determined to take steps to help, where it can in order to close the pay gap further.

2. 3. 2 The Equal Pay Act 1970

The Equal Pay Act was passed in 1970, when the pay gap between men and women stood at 37%. By the time the Act came into force in 1975, it had closed to 30%.⁷⁷

The Act made it unlawful for employers to discriminate between men and women in terms of their pay and conditions where they are doing the same or similar work; work rated as equivalent; or work of equal value. The Act applies to both everyone but does not give anyone the right to claim equal pay with a person of the same sex. In other words, any comparison must be with a person of different sex.⁷⁸

⁷³ Women and equality Unit, accessed at www.womenandequalityunit.gov.uk/legislation/equal_pay_act.htm

⁷⁴ Ibid

⁷⁵ Using the mean method, the full-time pay gap has closed from 29.5% to 20.2% in 1996 and from 20.7% in 1997 to 17.2% in 2006, and the full-time gender pay gap has closed from 17.4% in 1997 to 12.6% in 2006 using the median calculation method.

⁷⁶ Women and equality Unit, accessed at www.womenandequalityunit.gov.uk/legislation/equal_pay_act.htm

⁷⁷ Ibid

⁷⁸ Ibid

The Act addresses one aspect of the gender pay gap, that of unequal pay. The Government is helping to tackle wider causes of the pay gap such as job segregation and differences in work experience.⁷⁹

Eradication of gender discrimination especially in remuneration matters has always been the purpose of the Act whereby men and women are doing work that is the same or similar, work rated as equivalent under a job evaluation study, work of equal value in terms of the demands made on them under headings such as effort, skill and decision-making.⁸⁰

2. 3. 2. 1 Coverage of the Act

Men and women are given rights to equality in the terms of their pay rate and contract of employment under the Act. The Act covers both pay and other terms and conditions of work.

This means that even though a man and a woman are receiving the same basic rate of pay there may still be a breach of the principle of equal pay because other benefits (such as a company car, private health care etc) are not provided on an equal basis.

The Equal Pay Act applies to pay or benefits provided by the contract of employment. The Sex Discrimination Act covers non-contractual arrangements including benefits such as access to a workplace nursery or travel concessions.⁸¹

2. 3. 2. 2 The Comparator

In order to bring equal pay claim, a person must compare themselves with an actual person of the opposite sex who is treated more favourably and must be employed on equal work. This person is their "comparator". They can compare themselves with a predecessor or successor in their similar job.⁸²

The comparator must be in the same employment as the person creating the equal pay claim. Under the Equal Pay Act the term "same employment" broadly means that the

⁷⁹ Pay Equity, Pay Equity Resource Package, accessed at www.ei.ie.org/payequity/EN/docs/PSI/PSI_Dossier_Equity.pdf

⁸⁰ Ibid

⁸¹ Ibid

⁸² Women and equality Unit, accessed at www.womenandequalityunit.gov.uk/legislation/equal_pay_act.htm

comparator should be employed by the same or an associated employer and they must be performing same or similar work. However, the term has to be interpreted in the light of European Community law and the decisions of domestic courts and European Court of Justice.⁸³

In respect of the comparator, the Equal Opportunities Commission (EOC), which is the body charged with reviewing the working of all equal opportunities legislation in the United Kingdom, had called for an amendment to the Act providing for comparison with a hypothetical male.⁸⁴ This is because, as the situation stood, there was no redress for women who were segregated into an employment in which there were no comparable males engaged in the same employment example when it comes to domestic works performed by most women.⁸⁵

2. 3. 2. 3 The employer's defence for differences in pay

Employers do not have to provide the same pay and benefits for equal work, if they can prove that the difference in pay is genuinely due to a factor other than the difference in sex. It is for the employer to show that such a factor exists and that it is the real reason for the difference.⁸⁶

For instance, in some circumstances different geographic locations may justify a difference in pay, or the operation of market forces, such as the need to recruit for particular jobs or the need to retain employees occupying particular jobs. The employer must be able to show that all of the difference of pay is genuinely attributable to that factor and not otherwise.⁸⁷

The employer must also show that the factor is “objectively justified” if he or she relies upon a factor that could be indirectly discriminatory because it affects a greater proportion of workers of one sex than the other. For example, rewarding workers for

⁸³ Ibid

⁸⁴ Bourn C, Whitmore J, *The law of Discrimination and Equal Pay*; Sweet & Maxwell Ltd, London 1989

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Op. cit, Women and equality Unit

being prepared to work longer hours at short notice may indirectly discriminate against women workers with childcare and family responsibilities.⁸⁸

To show objective justification the employer must show that the difference in pay corresponds to a real need of his or her business, is necessary to achieve that business objective, and that it is not out of proportion to the objective.

2. 3. 3 Making a complaint

In the first instance it is likely to be in everyone's interest to try and resolve any problems within the workplace. In United Kingdom if a person has an equal pay claim they can use the equal pay questionnaire to find out whether they have received equal pay or discriminated.⁸⁹

Anyone who considers that they have been discriminated against under the Equal Pay Act can make a claim to an employment tribunal. There is no age or length of service requirement to present a claim, and the applicant does not have to work any specified number of hours as long as those people perform similar or same work.⁹⁰

There are strict time limits within which a claim must be brought. An application can be made at any time while the applicant is doing the job to which the claim relates; or within 6 months of leaving that job. The time limit for bringing an equal pay claim can be extended in cases where the employer has deliberately concealed information or the applicant has been under a disability.⁹¹

2. 3. 4 Government approach to reduce pay gap

A programme of action is underway to address the barriers faced by women and to further reduce the pay gap. The following steps have been advanced by the government in making sure that gender pay gap and occupational segregation diminish.⁹²

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Workplace Guidance on Amendments to the Equal Pay Act and Sex Discrimination Act (July 2003)

⁹² Pay Equity Now, Pay Equity Resource Package, accessed at www.ei.ie.org/payequity/EN/docs/PSI/PSI_Dossier_Equity.pdf

2. 3. 4. 1 Women and Work Commission

The Women and Work Commission⁹³ was set up by the Prime Minister to make recommendations on embarking upon the gender pay gap. The report was presented to the Prime Minister on 27 February 2006 and contains recommendations on how to tackle the gender pay gap.⁹⁴

The Government also issued an Action Plan⁹⁵ to implement the Women and Work Commission recommendations. The Action Plan includes fund to support initiatives to increase the availability of quality, part-time work. Support for Equality representatives through the Union Modernisation Fund. There were more details given on expenditure of the fund given to the commission for promotion of women equality on promoting skills and training as announced in Budget 2006.

2. 3. 4. 2 Legislation

Equal Pay Questionnaire was introduced in 2003 by the government to help an employee gain access to information on a comparators wage rates to decide whether to bring an equal pay claim.⁹⁶

There was also an amendment of the Equal Pay Act in October 2004 to allow a tribunal to choose to determine the question of equal value itself or to appoint an independent expert to prepare a report on that question. The new tribunal rules of procedure were introduced to speed up the process of equal pay claims.⁹⁷

The Discrimination Law Review is aimed at addressing long-held concerns about inconsistencies in the current anti-discrimination legislative framework including the scope for simplifying how the law on gender-related pay discrimination works in practice.

⁹³ The Commission, chaired by Baroness Margaret Prosser, which brought together employers, unions and experts in a wide range of fields.

⁹⁴ The Report can be downloaded from www.womenandequalityunit.gov.uk/women_work_commission/shaping_fairer_future.pdf

⁹⁵ Issued on 11th September 2006

⁹⁶ Women and equality Unit, accessed at www.womenandequalityunit.gov.uk/legislation/equal_pay_act.htm

⁹⁷ Ibid

2. 3. 4. 3 Occupational segregation

Occupation segregation is one of the main causes of the gender pay gap as earlier discussed. Women's employment is highly concentrated in certain occupations and those occupations which are female-dominated are often low paid. In addition, women are still under-represented in the higher paid jobs within occupations - the "glass ceiling" effect. The Government is taking steps to tackle occupation segregation, particularly in areas with skill shortages.⁹⁸

A plan of action to tackle occupational segregation was launched by the Government in October 2004.⁹⁹ The Equal Opportunities Commission launched the final report of their investigation into occupational segregation on 31 March 2005 and its findings and recommendations are informing Government policy in this area.¹⁰⁰

2. 3. 4. 4 Duty to promote gender equality

The government introduced the consultation document which contains a proposal that a public authority must develop and publish a policy on developing equal pay arrangements¹⁰¹ between women and men, which must be reviewed at regular intervals.

Women and equality unit is now working towards the Gender Duty to be implemented in April 2007. The unit would want to ensure that public authorities have sufficient time to prepare for the duty, ensuring that business plans for 2007-08 take account of their obligations under the gender duty.

2. 3. 4. 5 National Minimum Wage

The Government increased the rate of the national minimum wage¹⁰² for adults. The minimum wage plays a part in narrowing the gender pay gap, as women are more likely to work in lower paid and often part-time jobs than men. It is estimated that over 1.3 million workers stand to benefit from the October 2006 up rating, two-thirds of which are women.

⁹⁸ Ibid

⁹⁹ The Action Plan can be downloaded from, www.womenandequalityunit.gov.uk/research/tackling_occupational_segregation_oct04.pdf

¹⁰⁰ Op. cit

¹⁰¹ Including measures to ensure fair promotion and development opportunities and tackle occupational segregation

¹⁰² The new wage rates started on 1st October 2006, which increased from £ 5. 05 to £ 5. 35

3. PAY EQUITY IN SOUTH AFRICA

In a free market economy there is a freedom to determine wages which is inherent and essential as the freedom to determine prices of goods and services according to market demands.¹⁰³ Freedom to determine wages and prices have been subject to state regulation in capitalist economies, and collective bargaining has standardized and raised wages paid to workers. However, one principle has remained untouchable namely that employers may pay higher salaries to some workers than to others on the basis of skill, seniority, responsibility and experience.¹⁰⁴

In South Africa there is no specific pay discrimination legislation. In the early 1990's the previous government attempted to enact the Equal Opportunities Draft Bill; Section 6 of the draft bill stated:

'where an employee performs the same work or the work of same value than that which is performed by another employee of the opposite sex in the employment of the same employer, and

(a) the first mentioned employee's contract of employment, solely on the ground of his or her sex, contains a term which is less favourable for such employee than a similar term in the last mentioned employee's contract of employment, the clause of the first mentioned employee's contract of employment shall be deemed to have been adjusted so that it is not less favourable.

(b) the first mentioned employee's contract of employment, solely on the ground of his or her sex, does not contain a term which the last mentioned employee's contract of employment contains, and of which the effect is to place the first mentioned employee in a less favourable position than the last mentioned employee, the first mentioned employee's contract of employment shall be deemed to also contain such term.

Subsection (1) shall for a period of two years after the commencement of this section not apply to contracts of employment existing at such commencement.

Legislative or regulatory initiatives are a key mechanism for attaining social goals at the workplace, such as pay equity and employment equity. This is the mechanism emphasized by policy makers, politicians and the general public.¹⁰⁵ However there are other mechanisms for dealing with social issues such as discrimination at the workplace. These mechanisms are the private, unregulated market, as emphasized by economists, and collective bargaining as emphasized by the industrial relations community.¹⁰⁶

¹⁰³ Grogan J, *Wage War*, LexisNexis, Butterworths, Durban

¹⁰⁴ Ibid

¹⁰⁵ Agocs C, *Workplace Equality*, p 265

¹⁰⁶ Ibid

The general principle of pay discrimination has been that unequal remuneration in itself is not unfair,¹⁰⁷ and is indeed the rule, but where there is a differentiation it should be on the account of some factor which does not have as its basis generalized assumptions about the characteristics of particular groups of people.¹⁰⁸ The principle of equal pay for equal work has long been heard in South Africa. This principle can be applicable to many things but applies particularly in respect of race and gender.¹⁰⁹

3. 1 Pay or Remuneration in South Africa.

In some jurisdictions, such as the UK and the US there has been a lack of clarity as to what is included in pay. In South Africa, the Employment Equity Act defines ‘remuneration’ as any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State.¹¹⁰ The prohibition of unfair discrimination thus applies to all benefits flowing from employment and is not restricted to remuneration in any narrow sense.¹¹¹

Many factors explain the persistence of this gender wage gap, for instance differences in the productivity of men and women, the jobs they do, the number of hours they devote to paid and unpaid work, as well as gender-biased job classification or wage-fixing systems.¹¹²

The variety of causes leading to gender inequalities in pay makes it apparent that no single policy measure is sufficient to reduce them. A set of interventions that simultaneously address each cause of the gender pay gap is necessary.¹¹³ Job evaluations method help tackle discrimination in remuneration by comparing and establishing, on the basis of objective criteria, the relative value of two different jobs. Job evaluation helps to determine when two jobs that differ in content are of “equal value” and, thus, entitled to equal remuneration.¹¹⁴

¹⁰⁷ *Transport & General Workers Union v Bayete Security Holdings*, 1999, 8 LC 6.12.3

¹⁰⁸ Du Toit et al, *Labour Relations Law*, 3rd Edn, 1999 at pg 444

¹⁰⁹ *Louw v Golden Arrow Bus Services (Pty) Ltd*, 2000 21 Industrial Law Journal 188 (LC), at 196

¹¹⁰ Section 1 of the Employment Equity Act

¹¹¹ Du Toit et al, p 446

¹¹² ILO Decent work for women, ‘A proposal to accelerate the implementation of the Beijing Platform for Action’, 2000

¹¹³ Ibid

¹¹⁴ Ibid

Promoting equal pay for work of equal value, or pay equity, is a fundamental right at work, that is enshrined in the Equal Remuneration Convention, 1951 (No. 100), among the widest ratified of ILO Conventions.¹¹⁵ Pay equity is not about men and women earning the same; nor is it about changing the work that women do, but it is about redressing the undervaluation of jobs typically performed by women and rewarding them according to their value.¹¹⁶

3. 2 Statutes

In South Africa, the causes of continuing pay discrimination appear to be related to the limited effectiveness of pay equity legislation and, more particularly, to organizations' failure to comply with it. They seem reluctant to abide by this legislation on account of the pay bill increases that would ensue, and because of perceived potentially negative effects on their competitive position. Moreover, organizations fear that compliance with law may result in major transformations in the workplace, such as changes in the present occupational classification system or in the pay scales, thus leading to internal disputes and jeopardizing social peace.¹¹⁷

Such considerations explain employers' reluctance to undertake the steps required to identify and eliminate pay discrimination. Meanwhile, numerous studies on the impact of other anti-discrimination initiatives such as affirmative action, measures aimed at diversifying workforce composition or reconciling work and life, reveal that the success of such policies depends largely on the employer's commitment. Where this is missing, equality programs often have a limited effect because senior management may ignore their prescriptions.¹¹⁸

3. 2. 1 The Employment Equity Act

There are a number of legislations, codes, and policies which facilitate for pay equity in South Africa, but there is no specific legislation that deals with pay equity. The Employment Equity Act 1998 contains a number of provisions providing for affirmative action and protection against, amongst other things, unfair discrimination and sexual

¹¹⁵ International Labour Organization, Report 2003:48

¹¹⁶ Mworio K, *A comparative study of gender based pay equity Implementation: Lesson for South Africa*, (1999) LLM Dissertation, University of Cape Town

¹¹⁷ Chicha M, *A comparative analysis of promoting pay equity: models and impacts*, accessed at www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6596, at page 1

¹¹⁸ Ibid

harassment. The Act applies to all employers (public and private sectors) and uses gender neutral language.¹¹⁹

The primary purpose of the EEA is to achieve employment equity through

- a) the elimination of unfair discrimination
- b) the implementation of affirmative action to advance black people, women and people with disabilities.

It is worth noting that at this point the unfair discrimination provisions of the Labour Relations Act 1995 are now covered under the EEA chapter II. In this chapter, unfair discrimination is defined as “any distinction, exclusion or preference made on one or more grounds including race, gender, sex, pregnancy, marital status, family responsibility...” among other criteria.¹²⁰ Such discrimination which is prohibited is in respect of employment policy or practices which include recruitment procedures, advertising and selection criteria, remuneration, employment benefits, and terms and conditions of employment among other criteria.¹²¹

Section 5 of the Act provides for the elimination of unfair discrimination by requiring that “every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.” Section 6 prohibits unfair discrimination:¹²²

*“6(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including ... gender, sex, pregnancy, marital status, family responsibility...”*¹²³

The word ‘unfair’ is not defined in the Act but has been held in the case of *Association of Professional Teachers & Another V. Minister of Education & Others*¹²⁴ to be ‘differentiation [not] based on an objective ground and such differentiation has effect of nullifying or

¹¹⁹ ILO document accessed at e.quality@work, ‘Equal Employment Opportunities’ at www.ilo.org

¹²⁰ Chapter II of the Employment Equity Act

¹²¹ Du Toit et al, *Labour Relations Law*, 3rd Edition, 1999 at page 445

¹²² ILO document accessed at e.quality@work, Equal Employment Opportunities at www.ilo.org

¹²³ Ibid

¹²⁴ (1995) 161 ILJ 1048

impairing the recognition, enjoyment or exercise by all persons on all equal footing of all right and freedoms.¹²⁵

The general approach took by the Act is that employment equity covers both the elimination of discrimination, as well as, the concern of specific measures to accelerate the advancement of women. Such measures would deal with problems like unemployment of women and occupational segregation, and would include affirmative action and employment equity plans. This is very useful as a long- term goal for equipping women with the skill and experience they would need to put up a credible fight against wage inequality.

Measures to overcome pay differentials and/or discrimination that will assist women are found in section. 27 of the Act which requires designated employers to report to the Employment Conditions Commission on the remuneration and benefits received in each occupational category and level.¹²⁶ If income differentials are disproportionate, measures must be taken for their progressive reduction subject to guidelines by the Minister for Labour. These measures may include:¹²⁷

- collective bargaining;
- compliance with departmental determinations made by the Minister under s. 51 of the Basic Conditions of Employment Act 1997 (no relevant determinations to date);
- applying the norms and benchmarks set by the Employment Conditions Commission; and,
- relevant measures contained in skills development legislation;¹²⁸

Chapter III of the Act articulates of the development of Employment Equity Plans for those women suffered or affected from the pay differentials in the labour force. These plans may seem to only cater for employment and promotion at a first reading, but when this chapter is read together with chapter II their relevancy to all issues of unfair discrimination is evident. An equity plan does not compulsorily apply to employers with

¹²⁵ Dutoit et al, *Labour Relations*, at p 445

¹²⁶ Thompson J, *Pay Discrimination: revisiting the concept and International Perspectives*, (1998)

LLM Dissertation, University of Cape Town

¹²⁷ ILO document accessed at e.quality@work, Equal Employment Opportunities at www.ilo.org

¹²⁸ Ibid

less than 50 employees.¹²⁹ This ensures that whilst every employer is obliged to ensure that there is no discrimination, smaller employers need not bear the administrative burden of conducting audits, reviews and submitting reports. This is also a realistic starting point to ensure the effective monitoring of implementation in the first few years of the legislation's operation, especially since the Act includes both the public and private sectors.¹³⁰

3. 2. 2 Promotions of Equality and Prevention of Unfair Discrimination Act 2000

In order to comply with Section 9(4) of the Constitution No 108 of 1996¹³¹, the government enacted the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).

Section 29 of the PEPUDA ("the Equality Act") determines that the State must ensure that legislative and other measures are taken to address unfair practices in certain sectors, listed in the Schedule to the Act.¹³²

Item 1(c) of the Schedule determines that "failing to respect the principle of equal pay for equal work" amounts to an unfair practice in the labour and employment sector. Section 8 of the Act further includes the "systemic inequality of access to opportunities by women as a result of the sexual division of labour" in its comprehensive definition of unfair discrimination on the ground of gender.¹³³ The Equality Act does not apply to employers bound by the provisions of the Employment Equity Act,¹³⁴ it indicates an awareness of the realness of pay discrimination and provides the incentive for specific measures to address the problem.

3. 3 Relevance to International Instruments.

As far as discrimination is concerned, South Africa has ratified number of treaties, Conventions; Recommendations which helps improve the status of gender equality in the

¹²⁹ Grogan J, *Wage War*, LexisNexis, Butterwoths

¹³⁰ Ibid

¹³¹ Which places duty on the state to pass national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality

¹³² S 29(4) of the Equality Act. The list of unfair practices in the Schedule is intended to assist courts in determining the unfairness of such practices, with the aim of ultimately eradicating them.

¹³³ Grogan J, op. cit

¹³⁴ S 5(3) of the Equality Act.

country. These treaties, conventions and recommendations are non binding to countries which have ratified them but any state may incorporate them in its laws and policies.

In South Africa, the Constitution helps in promoting equality of everyone in the country regardless of their race, gender, ethnic, religion and the like. Under Section 233, the Constitution mandates courts to interpret all legislation in accordance with international law standards, while international law must also be considered when interpreting the Bill of Rights as per section 39(1) of the Constitution. Parliament has ratified a number of international treaties since 1994, including ILO Convention 111 on Discrimination in Employment,¹³⁵ which requires Member States to enact legislation to “promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”¹³⁶

ILO Convention 100 on Equal Remuneration,¹³⁷ this requires states to “promote and ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”.¹³⁸

The right to equal pay for equal work is further guaranteed by article 23 of the UDHR, while article 7(a)(i) of the International Covenant on Economic, Social and Cultural Rights guarantees a right to “fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”.¹³⁹

¹³⁵ Ratified by Parliament on 5th March 1997

¹³⁶ Articles 2, 3 of ILO Convention 111

¹³⁷ Ratified by Parliament on 30 March 2000

¹³⁸ Art 2(1) of International Labour Organisation Convention 100. For a useful summary of the provisions of the Convention and International Labour Organisation Equal Remuneration Recommendation (no 90), containing directives on the implementation of the provisions of Convention 100, see *Lim More and better jobs for women: an action guide* (1996) 140.

¹³⁹ The Covenant is yet to be ratified by South Africa, having signed it in 1994. Equal pay directives are also contained in art 4(3) of European Social Charter as well as in art 49 and annex 1 of the North American Agreement of Labour Cooperation. For a discussion of these provisions, see *Women in the working world: equality and protection within the European Social Charter* Study prepared by the Council of Europe Directorate of Human Rights (1995) 20-35; Johnson “Ensuring equality: pursuing implementation of the equal pay principle via the institutions of the European Union, the North American Agreement on Labour Cooperation, and Corporate Codes of Conduct” (1998) *Virginia Journal of International Law* 861-868.

3. 4 Pay Equity Claims

To date, claims of remuneration and benefit discrimination in South Africa have been heard exclusively under item 2(1) of Schedule 7 to the Labour Relations Act 1995. Since item 2(1)(a) has been repealed by the Employment Equity Act, claims relating to unfair remuneration discrimination will in future be heard under that Act.¹⁴⁰ Though making no direct determinations on equal pay, section 6(1) of the EEA forms the backbone of pay equity claims in South Africa.¹⁴¹

Inequality between men and women in the employment relates intricately to structurally imbedded patriarchal and sexist perceptions of womanhood and women's work.¹⁴² The precarious position of women in the employment sphere is attributable to a combination of factors, ranging from overt gender discrimination by employers to the "separate spheres" doctrine, according to which women have historically been confined to the "home" or "private" sphere (where they are conceived to be primarily occupied with child rearing and nurturing) whereas the "public" sphere (of which formal employment forms part) has traditionally been regarded as a male domain.¹⁴³

In particular, the unequal sexual division of labour has contributed to women being unable to dedicate their full attention to "public" careers, resulting in them having less work experience, more frequent changes in occupation and fewer opportunities for full-time employment than men.¹⁴⁴

The dominance of masculine values in public life and employment has further led to the devaluation of "women's work", culminating in professions regarded as being predominantly female (such as nursing and teaching) being significantly less financially rewarding than those alleged as predominantly male (such as engineering and law).¹⁴⁵

¹⁴⁰ Grogan J, *Wage War*, LexisNexis, Butterworths

¹⁴¹ Ibid

¹⁴² Ibid

¹⁴³ O'Regan *op cit* 65-66; Moore and Abraham *op cit* 294

¹⁴⁴ Belton and Avery *op cit* 342; England *Comparable worth: theories and evidence* (1992) 27-29;

Smith *et al op cit* 41-44; Loveday *op cit* 266-267.

¹⁴⁵ Fredman "European community discrimination law: a critique" (1992) *ILJ* 120-121;

3. 5 The Equal Pay Principle

Equal pay extends beyond the concept that all employees doing the same or similar work should receive the same remuneration. It suggests that employees should not be discriminated against regarding their remuneration. This rule is not without qualification, as unequal remuneration is not unfair per se; however when a difference in remuneration exists, the basis of this differentiation must not be a generalized assumption about the characteristics of a particular group of people.¹⁴⁶

3. 5. 1 The Onus of Proof

Discrimination in pay equity cases is often very difficult to prove, particularly when it is indirect and arises from job evaluation or classification systems. Applicants may encounter difficulties in substantiating allegations of discrimination, as they may lack the access to the necessary pay records.¹⁴⁷ For these reasons government should reverse the onus of proof, placing it instead on the employer to show that he/she is not discriminating.

In UK the onus of proof is distributed depending on the specific facts. The position is as follows:¹⁴⁸

- In direct discrimination cases it falls upon the applicant who alleges the discrimination
- In an indirect discrimination cases it falls upon the party alleging discrimination, except as to the question of justifiability, where the burden is upon the party attempting to justify the requirement or condition.
- Where a party alleges the case falls within one of the exceptions to the Acts, that party assumes the burden of establishing that this is so.
- Where a non-discrimination notice (a formal investigation conducted by one of the Commissions) has been issued, the burden falls upon the party alleging that the commission requirement is unreasonable. For instance incorrect finding of fact.¹⁴⁹

¹⁴⁶ Ibid

¹⁴⁷ Thompson J, *Pay Discrimination revisiting the concept and international perspectives*, (1998) LLM Dissertation, University of Cape Town Masters

¹⁴⁸ Bourn and Whitmore, *Sex Discrimination*, 1989, at p 57

¹⁴⁹ Ibid

The standard of proof in UK and that in South Africa is the equivalent to that of civil cases. Thus the standard of proof is on a balance of preponderance of probabilities.

3. 6 Equal pay for equal work opposed to work of equal value

For decades, theorists have been debating whether pay equity is achieved where women and men who perform same or similar work are paid similar wages. While it was initially accepted that the ideal of pay equity is fulfilled when workers who engage in similar or “like work” are remunerated on a formally equal basis, proponents of the concept “comparable worth” have since pointed out that such a formal conception of wage equality does little to address the structural foundations of wage disparities.¹⁵⁰

Recognizing that society undervalues work predominantly done by women in comparison to work predominantly done by men¹⁵¹ comparable worth theory (the essence of which is summarized by the slogan “equal pay for work of equal value”) holds that:

“Persons who perform jobs objectively dissimilar should receive similar pay based on a finding that the jobs have comparable economic value to employers or comparable social worth. Comparable worth theory posits that salaries set through market demands for particular types of jobs result in discrimination against women and minorities because of a history of their exclusion from higher paying jobs.”¹⁵²

Opponents of comparable worth criticise the principle for being overly subjective, vague, ignorant of market supplies and demands, and detrimental to employment output.¹⁵³

However, while the more formal concept of equal pay for similar work is less vague than the comparable worth approach and rests easily within the market-orientated

¹⁵⁰ Quinn *op cit* 1404; Belton and Avery *op cit* 378

¹⁵¹ Milkovich “The emerging debate” in Livernash (ed) *Comparable worth: issues and alternatives* (1980) 37.

¹⁵² Player *op cit* (1992) 193. See also the similar definition of comparable worth in the American case of *Power v Barry* 539 F Supp 721 (WD Mich 1982) at 722 as relied upon by Richey *Manual on employment discrimination law and civil rights actions in the federal courts* (1994) 96.

¹⁵³ Aldrich and Buchele “Does comparable worth correct for discrimination?” in Saunders *op cit* 155; Moore and Abraham *op cit* 296; Lim *op cit* 142-143; Killingsworth “The economics of comparable worth: analytical, empirical and policy questions” in Donohue *op cit* 380-384.

employment system,¹⁵⁴ it fails to address the underlying foundations of gender and race-based employment inequality.¹⁵⁵

3. 7 The equal pay for work of equal value in South Africa

The term ‘equal pay for work of equal value’ and ‘comparable worth’ are usually used interchangeably, although at times distinctions are made. Comparable worth is usually the term used in the US, although sometimes its used to distinguish between situations when the value of the jobs have to be comparable or substantially similar as opposed to identical or precisely equal before comparisons can be made. The term ‘equal pay for work of equal value’ is usually used internationally¹⁵⁶ and in South Africa.

The principle of equal work should receive equal pay in its true form may be extended to an analogous situation namely that work of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair discrimination has been committed.¹⁵⁷

If an employer pays employees unequally on the basis of their sex, this would clearly constitute discrimination on the ground of sex. However, it also means that a mere differentiation in pay between employees who do similar work or work of equal value does not mean in itself that an act of discrimination is being perpetrated. In the case of *NTAI & Others v SA Breweries Ltd* it was held that it is only when such differentiation is based on or linked to an unacceptable ground that it becomes discrimination within its pejorative meaning.¹⁵⁸

Assuming that differentiated remuneration is established, the inquiry is thus concerned with the nature or value of the work performed by the respective employees or groups of employees.¹⁵⁹ Assessing the value of work may be difficult particularly in cases of allegedly gender discrimination, because of the pervasive gender segmentation of the labour market. Similar problems arise with respect to race discrimination when

¹⁵⁴ Williams and McDowell “The legal framework” in Liversh *op cit* 221.

¹⁵⁵ Moore and Abraham *op cit* 296.

¹⁵⁶ Gunderson M, ‘Comparable worth and Gender Discrimination: An International Perspective’ (ILO 1994) at pg 2

¹⁵⁷ *Louw v Golden Arrow Bus Services Case*

¹⁵⁸ *NTAI case*, (2001) 22 Industrial Law Journal 214 (LC), at pg 219

¹⁵⁹ Du Toit et al, page 445

comparing job categories which have traditionally been filled by people from different racial groups.¹⁶⁰

3. 7. 1 Steps in applying equal pay for work of equal value

There is less agreement about the proper way to deal with the design, implementation and administration of equal pay for work of equal value. What is needed is debate and analysis on general principles that are not tied to any particular implementation steps, which will be outlined as:¹⁶¹

Identification of male dominated and female dominated jobs

The first step in applying pay equity involves the identification of male-dominated and female-dominated jobs within the establishment. The rationale is that female-dominated jobs tend to be systematically undervalued, and that male-dominated jobs provide the best comparison group for establishing the appropriate value for the female-dominated jobs.¹⁶²

Comparison

When assessing whether there has been discrimination, one naturally has to compare the position of employee or job category with that of other employees or job categories. The latter is referred to as the comparator. The need for a comparator has been one of the most problematic and limiting aspects of direct discrimination. How the comparator in an equal pay claim should be identified is not stated in the EEA or LRA.¹⁶³

(a) With whom the comparison is made?

A downside of equality as consistency is the need to find the comparator. Inconsistent treatment can only be demonstrated by finding a similarly situated person of the opposite sex who has been treated more favourably than the complainant.

In terms of the UK sex discrimination legislation, the comparison must be drawn with an employee employed with the same employer or associated employers. This comparator

¹⁶⁰ Ibid

¹⁶¹ Gunderson M, *Comparable worth*, page 31

¹⁶² Ibid, 31 - 32

¹⁶³ Du Toit, et al, at pg 447

may not be a hypothetical person, must be male and can be the woman's predecessor or, it has been argued, her successor.¹⁶⁴

Determination of the value of the job.

Once the gender dominated jobs are established, the next step in the application of the comparable worth is to determine the value of the job so that comparison can be made on jobs of equal value. This is done through gender neutral and formal job evaluation procedures.¹⁶⁵

There are a lot of job evaluation procedures ranging from simple rankings of jobs, to the classification into common jobs grades or to the use of job evaluation point scores. They all tend to involve a set of generic ingredients many of which have to be modified or adapted to be applied to the area of comparable worth.¹⁶⁶

Job evaluation

Job evaluation has as its purpose the establishment of a relationship in the pay received by different employees by assigning them to grades which attach a particular level of remuneration. Job evaluation starts with a job description that should be an accurate description of the essential ingredients of the job. In the application to comparable worth it is essential that the job descriptions describe the task that are actually performed since it is the actual task that matters and not the hypothetical set of tasks.¹⁶⁷

The job description can come from any number of sources, a procedure termed job analysis. Information can come from questionnaires, interviews, direct observations or job content analysis.¹⁶⁸

Once an accurate job analysis and job description is made, the jobs are then evaluated. In the comparable worth application this is crucial step because it is essentially how the value or worth of the jobs is established.¹⁶⁹ The job evaluation procedure essentially involves determining the key ingredients of the job in terms of factors such as skill, effort, responsibility and working conditions, termed compensable factors.¹⁷⁰

¹⁶⁴ Skidmore P, 'Commentary: Sex, Gender and Comparators in Employment Discrimination', (1997) 26 *Industrial Law Journal (UK)*

¹⁶⁵ Gunderson M, page 34-35

¹⁶⁶ Ibid

¹⁶⁷ Du Toit, et al, at page 448

¹⁶⁸ Gunderson M, pg 35

¹⁶⁹ Ibid

¹⁷⁰ Ibid

(a) The point factor job evaluation scheme

In the point factor evaluation scheme, those factors afore mentioned are assigned points within a predetermined range. The range may differ across the factors, which implicitly allows them to have different weights. The weighed point scores are usually summed to get a total job evaluation point score. This is the value or worth of the job.¹⁷¹

(b) An alternative job evaluation approach

In terms of the UK legislation, factors of the relevant jobs such as effort, skills and decision must be compared to establish the relevant value of jobs. The following guidelines have been proposed:¹⁷²

- work value is to be determined in terms of the demands made on the employee, not in terms of economic value to the employer,
- the job characteristics, and not the personal characteristics of the incumbent, are to be compared, and
- analytic job evaluation techniques are preferred to non-analytical techniques.¹⁷³

Collective Bargaining

Historically, even though trade unions have been playing big role in helping free women workers from discrimination by employers regarding working hours and unsafe working conditions, they have failed to achieve significant gains in closing the wage gap between men and women.¹⁷⁴

The inertia of the unions in assisting women could be attributed to a number of reason, for example, the fact that in union leadership the men often discriminate against the women in any case, also that women's double burden, that is, their responsibilities for their jobs and their homes meant that many of them were relegated to part-time work and the unions claimed to find it difficult to protect part-time workers. Unions also

¹⁷¹ Ibid

¹⁷² McCrudden C, *Equal pay for work of equal value*....453-457

¹⁷³ Ibid

¹⁷⁴ Browne N, Giampetro-Meyer, "The overriding Importance of Market Characteristics for the Selection of Pay Equity Strategies; The Relative Efficacy of Collective Bargaining and Litigation in the Nursing Industry" (1989-90) 11 *Industrial Relations Law Journal* 414, at p 4433

typically justified their failure to help women by treating their concerns, such as day care and maternity leave, as political rather than union matters.¹⁷⁵

Trade unionists have traditionally argued against a national minimum wage in the behalf that strong trade unionism, combined with collective bargaining are enough to eliminate low wages. It is possible that this is a viable method but the fact remains that even in the most advanced countries, women's trade union membership remains stubbornly at low levels.¹⁷⁶

As early as 1985, The Congress of South African Trade Union (COSATU), the largest trade union federation in South African history had made uncharacteristic move and called for "a legally enforced national minimum living wages for all workers".¹⁷⁷ This was in response to the plight of especially domestic and agricultural workers who are amongst the lowest paid in the country. Other low paid workers includes non- unionized staffs, subcontractors, casual labourers, part- time workers, temporary and home workers, almost all of these categories monopolized by women.¹⁷⁸

¹⁷⁵ Mworio N, *A comparative study of gender based pay equity implementation: Lesson for South Africa*, (1999) LLM Dissertation, University of Cape Town, at 30

¹⁷⁶ Ibid, at p 51

¹⁷⁷ Young G, 'The National Minimum Wage, Labour Research Service', Cape Town, 1991, at p 10

¹⁷⁸ Op. cit, at p 52

4. Comparative Study

*"I was of the opinion that successful borrowing could be made from a very different system even from one of a much higher level of development and a different political complexion. What, in my opinion, the law reformer should be after in looking at foreign systems was an idea which could be transformed into part of the law of his country."*¹⁷⁹

4. 1 POSITION IN INDIA

In India, things are certainly not tedious when it comes to women's wages. There certainly are employers who will not only pay women less but justify it as to why they paid women less. They will argue that as women in their early years, who have a much greater burden of family responsibilities, leave their jobs more often than men, this is high cost to the organisation in terms of training and educational input. What is conveniently forgotten is that traditionally a woman is more likely to remain "loyal" and less likely to scout around for a job than her male counterpart.¹⁸⁰

In fact, not only have there been instances of women getting less for doing the same job with men, the discrimination begins even earlier, at the recruitment stage. The discrimination continues through transfers or prestigious postings like overseas assignments and travel. Women also tend to be much less straightforward while negotiating their starting salaries or demanding a pay hike or a promotion.¹⁸¹

Things have now changed in India and in many parts of the world. Women, especially the younger are getting more aggressive and even moving to courts on issues like disparity in wages.¹⁸² Due to gender awareness, women in the world have known their rights and proceed to court of law to enforce them.

4. 1. 1 Legislative provision for pay equity

India uses the concept of "equal remuneration for the same work or work of a similar nature" which is not either used in South Africa or Tanzania. India is more advanced and in a step forward in matters concerning pay equity.

¹⁷⁹ Watson A, *Legal Transplant and Law Reform* (1976) 92 *Law Quarterly Review* 79

¹⁸⁰ Bhagat R, 'Equal work, Unequal Pay', accessed at www.hindunet.com

¹⁸¹ Ibid

¹⁸² Ibid

There is the Equal Remuneration Act which was enacted by the Indian Parliament in 1976. The Act provides for:

"the payment of equal remuneration to men and women workers and for the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto".

Employers are obliged under the Act to pay all workers of both sexes equal remuneration for the similar or same work done by them. The Act was amended by the Equal Remuneration (Amendment) Act 1987. This Amendment extended the scope of the Act to other aspects of personnel administration such as recruitment, promotions, training or transfer.¹⁸³

Article 39(d) of the Constitution mentions the principle of equal pay for equal work and Article 14 guarantees equality for all before the law. Also in South Africa and Tanzania their Constitutions prohibit for unfair discrimination and any discrimination against vulnerable group of people including women. India ratified the Equal Remuneration Convention in 1958.

4. 1. 2 The equal pay concept

The Equal Remuneration Act 1976 defines "remuneration" in section 2(g) as:

"the basic wages or salary, and any additional emoluments whatsoever payable, either in cash or in kind to a person employed in respect of employment or work done in such employment, if the terms of the contract of employment, express or implied, were fulfilled."

In the organized sector, a classic remuneration pack up comprises of a basic wage, dearness allowance (to compensate for inflation), other allowances, and the house rent allowance. The dearness and the house rent allowances can be different in offices of the same company due to the cost of living in different places.¹⁸⁴

¹⁸³ Maatta P, 'Equal Pay policies: International review of selected developing and developed countries', ILO, Labour Law and Labour Relations Branch, accessed at www.ilo.org/legrel

¹⁸⁴ Acharya 1995, 7- 8

In India, the principle of equal pay means equal remuneration for "the same work or work of a similar nature" as per section 4, which in turn is defined in section 2(h) of the Act as follows:

"work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment."

Under the Act, the principal operative section is section 4, which make provision for equal remuneration as follows:

"No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature."

Employers in India are free to classify occupations as they wish, thus rendering it difficult to compare same or similar jobs.¹⁸⁵ Thus, even if the work of a man and a woman are of a same or similar nature, job differentiation can be made artificially. For example, a cashier is paid more than an accountant, even if the job content is similar in both cases. The cashier is paid more because he handles cash, and his job is classified as more sophisticated than that of the accountant.¹⁸⁶

Scope of the equal pay provisions

The Act covers all industries and sectors, public and private, organized and unorganized, and all employees doing permanent, temporary, part time and casual work. The law covers central, state and local authorities, financial institutions, educational institutions, provident funds and other state insurance corporations, the Food Corporation of India and other warehouses, all industries under National Industrial Classifications (NIC).¹⁸⁷

¹⁸⁵ Acharya 1995, 7

¹⁸⁶ Ibid, pages 6- 7

¹⁸⁷ Maatta P, 'Equal Pay policies: International review of selected developing and developed countries', ILO, Labour Law and Labour Relations Branch, accessed at www.ilo.org/legrel

The Act does not cover self-employed workers like unpaid women workers in farming, households and in the unorganized sectors in large numbers.¹⁸⁸ Hence this is still a problem as most of women work in the informal sector and are paid less.

“The principle of equality is applicable within an establishment. The law permits wage differences to exist across establishments. The wage differentials can be high across establishments because of differences in productivity, and the capacity to pay may differ widely. Since wages in general are low in India, very often there are de facto equal wages due to the general payment of minimum wages. Thus the Minimum Wage Act, 1948 is of overriding importance in respect to equal remuneration in India”.¹⁸⁹

The Act does not apply in cases affecting the terms and conditions of a woman’s employment in compliance with the requirements of any law giving special treatment to women, or to any special treatment accorded to women in connection with the birth or expected birth of a child, or the terms and conditions relating to retirement, marriage or death or to any provision made in connection with retirement, marriage or death.¹⁹⁰

4. 1. 3 Measures for determining and promoting pay equity

Grounds permitted for wage differentials

There are circumstances where by wage differential is allowed. In India the Equal Remuneration Act allows differences in wages for the same work or work of a similar nature if the wage difference is due to a genuine material difference, and is not based on sex. There should be another reason for wage differential which should not be based on sex for there not to constitute discrimination.¹⁹¹

Instruments used to promote equality

Job evaluation

In India, job evaluation is seldom used for evaluating and comparing different jobs between male employees and female employees. Most users of job evaluation schemes

¹⁸⁸ Op. cit, pages 5, 9

¹⁸⁹ Ibid, page 7

¹⁹⁰ Maatta P, ‘Equal Pay policies: International review of selected developing and developed countries’, ILO, Labour Law and Labour Relations Branch, accessed at www.ilo.org/legrel

¹⁹¹ Bhagat R, ‘Equal work, Unequal Pay’, accessed at www.hindunet.com

are to be found in modern sectors such as the steel industry and aviation. Indian conditions do not favour job evaluation in regard to wages. Wages rarely depend primarily on job content, but they are usually influenced by seniority and bargaining power. Trade unions do not favour job evaluation, because it is costly.¹⁹²

Scope of comparison

Scope of comparison is limited to men and women performing the same work or work of a similar nature for the same employer. The comparison may be done within an establishment, but not across establishments.¹⁹³

The Supreme Court decision in the case of *Mackinnon Mackenzie and Company v DCosta*¹⁹⁴ indicates that “ the scope of the Equal Remuneration Act in relation to work comparison is more limited than the principle set out in the Conventions. The court further stated that discrimination arose only where men and women doing the same or a similar kind of work were paid differently. The Court distinguished this situation from that where men and women carried out different kinds of work. It held that there can not be any discrimination on the grounds of sex in respect of the work done by men which women may not be able to undertake, such as loading, unloading, carrying and lifting heavy things.”

4. 1. 3. 1 Enforcement of the equal pay principle

The Labour Commissioner's Office

The labour ministries of the Central and State Governments are responsible for regulations of pay equity in India. Each of these ministries has set up its own Office of the Labour Commissioner to manage industrial disputes, maintain industrial peace and enforce labour laws, such as the Equal Remuneration Act.¹⁹⁵ The Central Government owned or controlled establishments are under the purview of the Office of the Labour Commissioner of the Central Government, whereas private and state government owned

¹⁹² ILO Report 1986 a, at pp 125- 126

¹⁹³ Bhagat, op. cit

¹⁹⁴ (1987) 2 SCC 469

¹⁹⁵ Maatta P, ‘*Equal Pay policies: International review of selected developing and developed countries*’, ILO, Labour Law and Labour Relations Branch, accessed at www.ilo.org/legrel

or controlled establishments and organisations, as well as agriculture, fall under the jurisdiction of the Labour Commissioner of the particular state.¹⁹⁶

In addition to the tasks mentioned above, the office also conducts socio-economic surveys on wages and publishes reports on labour matters. The Equal Remuneration Act is one of the enactments for whose enforcement the office is responsible, but it is also one of less significance in relation to its overall responsibilities. As at the central government level, the issue of minimum wages is the most significant at the state level.¹⁹⁷

The Equal Remuneration Act provides for appointment of Inspectors, who have the power to investigate any establishment, summons employers or their representatives, and impose sanctions in cases of non-compliance. According to the Act, employers are responsible for maintaining registers and other documents in relation to the workers employed by them.¹⁹⁸

Enforcement process

The Equal Remuneration Act requires employers to maintain such registers and other documents as may be prescribed for the purposes of the Act.¹⁹⁹ Rules made pursuant to section 13 of the Act specify that a register must be maintained that contains information on the category of workers, a brief description of the work, the numbers of men and women employed, and details of their remuneration. The Act gives wide investigatory powers to specialist Inspectors to enter premises, inspect documents, and take evidence for the purposes of the Act.²⁰⁰

The State and Central Governments may appoint authorities for hearing and deciding on claims arising out of non-payment of wages at equal rates and complaints with regard to non-compliance with the Equal Remuneration Act.²⁰¹ These authorities also decide whether work being compared is of the same or similar nature.

When a complaint or claim is made to the authority, it firstly gives the applicant and the employer an opportunity to be heard. In the case of a claim, it may then decide that

¹⁹⁶ Acharya 1995, 10- 11

¹⁹⁷ Ibid, pages 12- 13

¹⁹⁸ Bhagat R, 'Equal work, Unequal Pay', accessed at www.hindunet.com

¹⁹⁹ Section 8 of Equal Remuneration Act

²⁰⁰ Ibid, section 9

²⁰¹ Ibid, Section 7

payment has to be made to the worker of the amount by which the remuneration payable exceeds the amount actually paid. For the purpose of recovering money, section 33C(1) of the Industrial Disputes Act, 1947 applies. In the case of a complaint, adequate steps must be taken by the employer to ensure that there is no contravention of the Act.²⁰²

An employer or worker aggrieved by an order made by an authority on a complaint or a claim may refer an appeal within 30 days to the appeal authority appointed for that purpose by the state government. That authority may, after hearing the appeal, confirm, modify or reverse the order appealed against.²⁰³ No further right of appeal lies against an order made by such authority.

In India all social welfare organisations have been recognised and supported by the government and they have been contributing towards achieving gender equality. A number of State governments (West Bengal, Tamilnadu, Punjab, Maharashtra, Manipur) have also recognised some voluntary organisations under the Act.²⁰⁴

The penalties in cases where an employer contravenes the Equal Remuneration Act range from Rs. 10 000 to 20 000 as fine and between three and twelve months imprisonment for the first offence. An employer is liable to up to two years imprisonment for the second and subsequent offences.²⁰⁵

4. 1. 3. 2 Function of the social partners

Trade unions

In India, there is a three-tier system in workers organizations. There are unions at the factory and establishment level, which in turn have local (city or regional) associations. The federations at the apex are at the all India level. These federations are associated with one of the several political parties. However, not every factory and establishment level union is linked in a hierarchal structure with an apex federation. They may be

²⁰² Ibid, section 7

²⁰³ Section 7(6)

²⁰⁴ Maatta P, 'Equal Pay policies: International review of selected developing and developed countries', ILO, Labour Law and Labour Relations Branch, accessed at www.ilo.org/legrel

²⁰⁵ Bhagat R, 'Equal work, Unequal Pay', accessed at www.hindunet.com

independent or have local level associations only. Most small establishments have no unions.²⁰⁶

The services sector in the non-commercial sphere, is affiliated with the workers unions, but have formed their own unions, which may also have political party affiliations through regional and national federations. Moreover, workers from agriculture, the unorganised manufacturing sectors and the small services establishments are not necessarily keen to form larger affiliating bodies.²⁰⁷

Among the main reasons that the Equal Remuneration Act is not being effectively implemented is the small size of the labour force actually in the organised or protected sectors.²⁰⁸

Policy on Equal pay

According to the All India Trade Union Congress, the implementation of equal pay is difficult in industries such as the garment, packing and pharmaceutical industries because the unions are unable to pursue cases due to the difficulty of obtaining proof that the legislation has been contravened. One reason for this is that information systems are weak on numbers, payments, and recording contractual terms. Because of the difficulty of obtaining evidence and the slowness of court procedures, unions prefer to enter into bilateral negotiations with employers.²⁰⁹

The Centre for Indian Trade Union has stated that there are still many shortcomings in the implementation of the Equal Remuneration Act.²¹⁰ It has also mentioned that, in certain industries, employers use a piece-rate system to avoid paying equal wages for women's work, or else claim that the work performed by women is of a different nature to that performed by men, even when the nature of the work is in essence the same or similar. This explains why women workers in construction, garment, agriculture and other industries continue to get lower wages than male workers.²¹¹

²⁰⁶ Ibid

²⁰⁷ Acharya, 14

²⁰⁸ Ibid, pages 14- 15

²⁰⁹ Ibid, pages 16 – 19, 22

²¹⁰ Bhagat R, 'Equal work, Unequal Pay', accessed at www.hindunet.com

²¹¹ Maatta P, '*Equal Pay policies: International review of selected developing and developed countries*', ILO, Labour Law and Labour Relations Branch, accessed at www.ilo.org/legrel

4. 1. 3. 3 Public sector's role

A Central Advisory Committee has been set up under section 6 of the Act to advise the Government with regard to increasing employment opportunities for women. In many Union Territories of State Government and its administration set up the similar advisory committee whereby half of the employees in the committee are women.²¹²

The Central Government may make rules for carrying out the provisions of the Equal Remuneration Act.²¹³ It may also give directions to a state Government concerning the execution of the Act in the state.²¹⁴ If any difficulty arises in giving effect to the provisions of the Act, the Central Government may, by notification, make any order, not inconsistent with the provisions of the Act, which appears to it to be necessary for the purpose of removing the difficulty.²¹⁵

4. 2 TANZANIA POSITION.

The position of Tanzania on pay equity can be traced way back during colonial era. Colonialism contributed to the present discriminative traditions. Indeed, though it is true that both sexes begun to join paid employment during the colonial era, women had usually lagged behind men. For instance, women were very few in number if not completely absent in paid jobs. The introduction of foreign social values and ways of life has worsened the status of women in the society for they were closed to women.²¹⁶

Women were given marginal functions once they were employed, e.g. insect gathering in coffee or tea plantations, baby sitting, and clerical/secretarial jobs in offices. Also they were made dependants and pushed into a secondary position to that of man. This is because they were paid less for what they did than men.²¹⁷ Colonialists considered it more profitable for their foreign capital to force women to remain in the rural areas to cater for subsistence economy which was very important for reproduction of the labour power.

²¹² Ibid

²¹³ As per section 13

²¹⁴ Section 14

²¹⁵ Section 17

²¹⁶ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, (2002) LLM Dissertation, University of Dar es Salaam

²¹⁷ Inter- African Labour Institute, Bulletin No 2, March 1955, p 25

Colonial labour policy encouraged the employment of men and discouraged their families from joining them at working places by providing low salaries, inadequate housing facilities and the official reason not to employ women as that employing them would encourage prostitution²¹⁸ but in actual fact the work of women was and is not valued.

Consequently, the majority of women (91% of the economically active women)²¹⁹ were working in the agricultural sector for both export and food crops either as self employed, casual labourer, permanent employees or a combination of the first two. The increased tendency to commercialize agriculture would surely lead to expansion of wage employment for women in agriculture and probably lead to more marginalization and proletarianization of the peasantry class.²²⁰

Wage employment in the agricultural sector has also tended to apply the “law” of feminization in the sense that women usually are employed for tasks like transplanting rice, weeding, picking up coffee, cotton etc which is manual work which as a result women are undermined. When improved technology in the agricultural field is introduced then women are pushed out and are replaced by men.²²¹

The colonial economy therefore brought a salaried African Social class who were male mostly, educated by the colonial government and then employed in the sectors run by colonialists. The educational and employment systems which favoured men, widened further the gap between male and female.

Thus the previous situation of women in the pre-colonial Tanganyika now overlaid the new colonial political economy conditions. For example the Master and Native Servant Ordinance²²² which contained no provision relating to neither women employment nor their protection and for those who filtered in, they were not allowed from doing certain types of works and hours of work were limited.

²¹⁸ Bertha Koda, *Research Priorities and Support needs on Women and Employment in Tanzania WEDP*, A paper presented to OSSREA Workshop Addis Ababa 1986, p. 16

²¹⁹ 1990/91 Labour Force Survey, op. cit

²²⁰ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, (2002) LLM Dissertation, University of Dar es Salaam, page 78

²²¹ Ibid

²²² No 32 of 1923

Also the Employment of Women Ordinance²²³ was geared for restricting²²⁴ hours of work for female employees, later the Employment of Women and Young Persons Ordinance²²⁵ equated women employees to young persons in all terms and hours of work. The Employment Ordinance²²⁶ which contain the same prohibitory and discriminative features, though for the first time it afforded some protection to female employees in relation to maternity leave.²²⁷

4. 2. 1 Wages

The colonial economy was based on tremendously low wage rates bearing very little relations to the cost of maintaining labour power. The wages provided only for the minimum requirements of an adult male. Within the cheap colonial labour force women and children labour were considered the cheapest. It was paid much less than male labour and filled an important gap especially during shortage of labour with much work to do.

Women were only paid two thirds (2/3) of what was paid to men²²⁸. However, there is no any provision in the labour statutes which provides for difference in wages based on sex. For example, such provision was supposed to be found in the Minimum Wages Ordinance²²⁹ or in the Regulations of Wages and Terms of Employment Ordinance²³⁰ of which these two Acts provides for wage matters for any employee or worker. But there is general application of section 3 of the former Ordinance which empowered the Governor in the Council to fix a minimum wage for piece of work, time of the work and special classes of employees within the same occupation. These special classes of people were not defined, so it is difficult to know whether it meant men or certain professionals.²³¹

²²³ No 14 of 1938

²²⁴ Section 3 of the Ordinance

²²⁵ Cap 82

²²⁶ No. 47 of 1955

²²⁷ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, (2002) LLM Dissertation, University of Dar es Salaam, page 83

²²⁸ Inter – African Labour Institute No. 2 March 1955 also see Ministry of Labour and Social Welfare Headquarters (MLH) 4/29/8 Inspection report 10th July 1941.

²²⁹ No. 19 of 1939.

²³⁰ No. 15 Of 1951.

²³¹ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, (2002) LLM Dissertation, University of Dar es Salaam, page 86

Therefore, colonial Labour Legislation affected wages in relation to female employees by not giving consideration and protection while knowing that the wages they give to female labourers were very low compared to the extent they have worked.

4. 2. 2 Promotions

Everywhere in Tanganyika, women were discriminated against, paid scandalous low wages, denied opportunities to advance in employment and enjoyed few if any social security benefits²³². As women were being the most disadvantaged group, the colonialists had two major attitudes governing the recruitment of women.

One is the attitude that women if employed should deal with the residual functions operations which either are interesting or do not pay well. In the absence of the availability of such operations, women may not be engaged.²³³ Secondly, women employment was not regarded as a matter of right but as a privilege. Even today in many advanced capitalists societies women constitute some kind of a reserve army of labour power. In booms they are pulled into the labour force only to be pushed out again during hard times to make room for the male labour.²³⁴ In other words, it can be argued that women were, and are being used as shock absorbers in the labour market. In such conditions the issue of promotions did not exist, for they were made to absorb the shocks of capitalists crisis by simply being last hired first fired²³⁵.

4. 2. 3 Position After Independence

Together with Africisation, after independence still women could not be promoted to the required standard though there were very few women who had entered into politics and those few elites who when compared to semi illiterate men of those days men were seen better than women due to male chauvinism.²³⁶

²³² Tumbo, N.S.K. "Towards NUTA: The Search for Permanent Unity in Tanganyika's Trade Union Movement" *Labour in Tanzania*, Studies in Political Science No. 5, University of Dar es Salaam, 1977, p.2, see also Elkan, Water and Feller, Lloyd A : *The Mobility of labour in Moore, Wilburt E; Feldman, Arnold S. (eds) Labour Commitment and Social Change in Developing Areas*, New York Social science Research council 1960, p. 245.

²³³ Ibid

²³⁴ Ibid

²³⁵ ILO, "Discrimination in Employment and occupation as the Basis of Marital status: International Labour Review, vol. LXXXV, Nos. 3 and 4 (March and April, 1962).

²³⁶ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, (2002) LLM Dissertation, University of Dar es Salaam, page 45

4. 2. 3. 1 Legislation

As discussed above, there were many labour legislations in the colonial era which did not favour for women employment, and if they were favoured their wage was very different and minimal to that of men whom they performed similar work. After independence some statutes were repealed and replaced and some were just amended but nothing changed drastically.

Tanzania Labour legislation especially Employment Ordinance²³⁷, Security of Employment Act²³⁸ and Regulation of Wages and Terms of Employment Ordinance for equal job opportunities²³⁹ do not contain provisions for equal job opportunities or equal pay and equal treatment for men and women. Fortunately such provisions are found in the Constitution which many of Tanzanian employees are not aware of, though it is the *ground norm* from which other laws obtain their mandate.²⁴⁰

Women and Young Persons Ordinance²⁴¹ equated women employees to young persons in all terms and hours of work. The Employment Ordinance²⁴² contained the same prohibitory and discriminative features, though for the first time it afforded some protection to female employees in relation to maternity leave.²⁴³

While the articles 22 and 23 of the Constitution provide for right to work and right to fair remunerations respectively, some provisions of the employment Ordinance violate women's right to work, as they provide for minimum working time for women who are able to work as long as one wishes to, and when it comes to remuneration, they are paid low regardless of the work they have performed or hours spent working..

In Tanzania there is no deliberate or statutory wage differentiation between men and women, equal work done by men and women is supposed to be paid the same and equally. Yet women earn less income due to being at the lower ladder of the occupation or occupying less paying occupations. However even within the same occupations with

²³⁷ Cap 366.

²³⁸ No. 62 of 1964.

²³⁹ Cap. 300.

²⁴⁰ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, 2002, page 82

²⁴¹ Cap 82

²⁴² No. 47 of 1955

²⁴³ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, 2002, page 83

men with same experience, skills, level of education and training, women earn less income mainly due to socio- cultural factors imposed by patriarchal system, for example a man is said to be a bread winner and therefore with big family financial responsibility.²⁴⁴

This is because it is argued that the income of women is not needed to support a family but just to add to the household income which is brought by the man of the house²⁴⁵ others argue that female wage do not belong to the men and hence would serve as an objective basis for female subsistence independent of familiar male control.²⁴⁶

Patriarchy system contributes greatly to proliferation of gender inequality between men and women. It is common knowledge that women's effective participation in development is embarrassed by unfavourable social and cultural factors, unequal gender division of labour, lack of necessary motivation and confidence as well as lack of necessary information. In most cases these factors are influenced by the dominant patriarchal ideology manifested in different ways such as norms, customs, values and institutions.²⁴⁷ As Mwalimu Nyerere once said:

...”there was in most parts of Tanzania an acceptance of one human inequality. Although we try to hide the fact and despite the exaggeration which our critics have frequently indulged in, it is true that the women in traditional society were regarded as having a place in the community which was not only different but was also to some extent inferior.”²⁴⁸

Also in Tanzania there was the enactment of the Minimum Wages Act of 1962 assuring employees a fixed minimum wage by the government, coupled with the rise of wages, rural poverty and lack of employment opportunities, triggered off an unparalleled rural migration of women. These movements of women and men into towns were in fact a reflection of the direction of structural changes that the Urban – industrial economy had set in motion. Most of the young women are uneducated and untrained for anything, begun to flock to the towns. Some of them found jobs in private households and in industries and others fixed themselves in the then mushrooming business which rose

²⁴⁴ Ibid, page 76

²⁴⁵ Joeke S. P, *Women in the World Economy*, Oxford University Press New York 1989, p. 183

²⁴⁶ Ibid

²⁴⁷ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, 2002, page 75

²⁴⁸ Nyerere J. K, *Freedom and Socialism*, Dar es Salaam Oxford University Press 1968, p 339

with rising incomes such as liquor bars, casinos and night clubs. The resulted in much irregularity of employment and low pay and their job security was small.

In need, there was an improvement on the opportunities of employment of women though such advancement was only in certain sectors of the economy namely services and the industrial sector²⁴⁹. This female employment increase is determined by the fact that by 1967 Tanzanian population was 11, 951,437. Out of this female were 6, 113,600 and males were 5,837,837. The size of economically active population of all ages was 5, 569,745 of whom 2, 64,864 were female and 2, 911,159 were males²⁵⁰.

The establishment of the National Provident Fund (NPF) in 1964 (now National Social Security Fund (NSSF) in 1997) as a contributory pension scheme was another step towards welfare of employees. Section 8 of the NSSF Act required every employer with three or more employees to contribute to the fund. Benefit payable under the Act were in respect of age, survivorship and invalidity²⁵¹ and the same could be payable at the retirement age of 55²⁵². Female members had an option to retire on marriage or child birth,²⁵³ provided one proves that she had permanently given up wages employment and does not intend to seek such employment in future.

Medical care is also provided to the female members during pre and postnatal period provided that the postnatal medical cares does not exceed twelve weeks. Other benefits include employment injury benefit whereby medical care is granted to an insured person for twenty weeks²⁵⁴ for temporary disability, while permanent disability, while permanent disability is paid throughout the period of disability.²⁵⁵ The Act also provides for Medical Benefits to insured members²⁵⁶ whereby benefits shall be limited to the medical services to be provided by the doctors, nurses and other medical providers in the accredited hospitals²⁵⁷. Taking the above three conditions, that is to say, medical postnatal period, employment injury benefit and medical benefit to a normal sick member, we can see that

²⁴⁹ Cleaon, claes – Federik, Movement to Towns in Tanzania Tables and Comment (mimeo)1971 p.39

²⁵⁰ United Republic of Tanzania (URT) Statistical Abstract 1970 Government Printer, Dar es salaam 1972, Table C 5(a) and 9b p.49 table c 12 p.56 and Table 14.

²⁵¹ S.22 of The National Provident Fund Act of 1964.

²⁵² Ibid. S. 15(1).

²⁵³ Ibid. S.28 (2).

²⁵⁴ Ibid. S.40 (b) (i).

²⁵⁵ Ibid Sub. (ii).

²⁵⁶ Ibid. s. 42.

²⁵⁷ Ibid. s.42.

medical care during post natal is limited to twelve weeks while the injury benefit is twenty six weeks and the latter is not specifically provided for. This indicates that female members are on the disadvantageous side when they are prolonged medical care after delivery.

4. 2. 3. 2 Effects of Labour Legislation to Women

Slim opportunities to female employees and advancement.

It is evident that there has been an increase of wage women after independence following enactment and amendment of some labour statutes. As discussed above, most of the colonial labour statutes discriminated women to work in the formal sectors and instead they were pushed to informal sectors such as agriculture and which was seasonal.

Certain sectors of economy such as services and industry after independence improved on the opportunities of employment and advancement for women.. The overall total female employment witnessed a considerable drop from 1961-1970. For example, in Agriculture, Forestry, hunting and lodging in 1961 there were 19019 females. While in 1970 they dropped to 2001²⁵⁸. In need, this was due to, partly to the fact that job opportunities for women during this period suffered from the same economic difficulties that overwhelmed the whole country and partly due to the social- economic measures taken by the nationalist government.²⁵⁹

A year after independence, over 50% of the entire female labour force were still employed in agricultural industry. Unfortunately, during the first five years or so of independence there was a severe decline in the prices of sisal in the world market causing a fall in the number of people in wage employment in this sector. The situation was also made worse by some measures that were taken by the government soon after independence to improve the African's Worker's lot.²⁶⁰

²⁵⁸ Tanganyika, Ministry of health and Labour, Annual Report and Labour Division, 1961 Government Printer Dar es salaam, 1962 Appendix 11, Tables 1 (D) and 1 (F) pp.30-33 and 38-42 respectively. Also United Republic of Tanzania Bureau of Statistics Survey of Employment and Earnings 1970 (dar es salaam 1972) Appendix VIII.

²⁵⁹ Ibid

²⁶⁰ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, 2002, page 92

When the prices of sisal were falling and the costs of labour soaring up, the management had no other alternative except prune the less productive type of labour and introduce intensive utilization of the remainder.²⁶¹ Therefore, the female labourer was much more expendable than the male labour. So the axe fell much more heavily on them than on the males and they should not be blamed for that, since their major aim then was to survive and remain in business.²⁶²

The Employment Ordinance²⁶³ also reduced employment opportunities to women and thus contributing to the sliminess caused by other labour statutes. For example, section 86 of the ordinance restricts women employment in the mines. Further that it is an offence for any employer who employs a female in contravention of subsection (1).²⁶⁴ The amendment Act of 1975 to Employment Ordinance, which provides for maternity leave of 84 days for female employee increased bias to some employers on the employment of women. There was a general drop in the employment of women after this Act, in some industries like Moshi Textile no woman was employed after the Act

The assessment of opportunities for advancement of women considering level of education shows that women in the supervisory posts are concentrated in lower grades²⁶⁵, while to advance in wage employment she must be outstandingly better than a rival man. Unlike men, the majority of women will advance into supervisory position on the basis of their qualifications and expertise rather than through promotions from humble beginnings (as is generally the case with men). And since management appointments are a recent appointment to such levels.²⁶⁶

Indeed, women are grossly under represented wherever decisions are made, regardless of the level of the institutions involved. This is especially true within government machinery despite the fact that it is signatory to many of the international conventions and resolutions on gender equality. The market disparities between women and men in public life are most noticeable in government at the leadership level and in decision

²⁶¹ As narrated by one former sisal magnate in Tanga Region

²⁶² Chijumba, B. J, *Women in Wage Employment a study in their opportunities, Needs and Problems in Tanzania*. (Theses) 1980 at p.147.

²⁶³ Cap. 366.

²⁶⁴ Section 86 (2)

²⁶⁵ See Chijumba, B.J.op.cit p.290.

²⁶⁶ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, 2002

making. The civil service employs the largest number in public sector (32%)²⁶⁷. However, it falls in the same gender category in management issues as other sector women's participation in middle and senior position is only 19 %, the majority of whom are in personnel administration.²⁶⁸

The existence and persistence of gender wage gap in employment is a fact which the top government executives are aware of and confirm that it does exist; this is found in the Prime Minister's speech when he said:

“...we must admit that we still have a long way to go in question of giving women their rights. Women are not given their rights when considering employing new workers or giving promotion in the civil service or in the parastatal organizations. *It is men who are considered first in our day to day life*”²⁶⁹.

Since labour legislation do not provide for specific percentage of employment opportunities for women then the above assertion cannot solve the problems.²⁷⁰

Job discrimination and segregation between men and women.

Both men and women work, and have ability to work equally. But many aspects of their work are different. For example, the kind of work, rates of pay, level of participation and allocation of responsibilities are some of the aspects in which men and women differ in labour force market.²⁷¹ Job segregation and wage discrimination (direct or indirect) persist almost everywhere with a big gap between what women produce (or how important their contribution is) and what they actually earn. Women have also less access to training promotions and resource allocation compared to men²⁷².

Independent Tanzania inherited the colonial economic structure and classes. The received laws and enacted laws reflect the status quo. There have been no major changes in the minds of the law and policy makers in relation to female employees. This is

²⁶⁷ Tanzania Gender Networking Programme (TNGP) beyond inequalities Women in Tanzania, 1998, Dar es Salaam.

²⁶⁸ Op. cit, page 101

²⁶⁹ Daily News (TZ) 21/10/1976 and Daily News 23/4/1978.

²⁷⁰ Op. cit

²⁷¹ Tanzania Gender Networking Programme (TNGP), 'Beyond inequalities Women in Tanzania', 1998, Dar es Salaam, at p 34

²⁷² Ibid

supposed to be the contents of Presidential Standing Committee on Parastatal Organizations.²⁷³

4. 2. 3. 3 Inadequacy in the Labour Legislation and the Constitution of Tanzania

The labour legislations as we have seen above are the creation of the colonial government geared for the capitalist production, which entails maximization of profit through cheap labour. The Employment Ordinance which was inherited does not provide for gender employment equal treatment. It affords no protection for women workers in terms of equal job opportunities between female and male wages. The law being so blind, the state took that opportunity and issued some discriminatory, standing orders and circulars to fill in the gaps.²⁷⁴

As a parent statute, the Employment Ordinance should embody such provision on gender equality in terms of work and remuneration. Indeed, in the Regulations of Wages and Terms of Employment nothing touches on the gender equality. Therefore the government as a major employer, parastatal organizations and other private employers use this inadequacy of the law to the detriment of female employees as they prefer employment of male than of female workers.²⁷⁵

With the change of government from colonial to independent Tanzania the new government rejected the idea of incorporating a Bill of Rights in her Constitution at the eve of independence for various official reasons. The fifth Constitutional amendment of 1984 entrenched for the first time since independence, a Bill of Rights in the Constitution of Tanzania. Thus fundamental rights and freedoms became legally pronounced.²⁷⁶

The adoption of Bill of Rights ushered in new thoughts and hopes amongst the people had determinedly fought for the same and that a new era of social justice would emerge.

²⁷³ Mmasi E, *Labour legislation and women employment in Tanzania: A case of job discrimination*, 2002, page 83

²⁷⁴ Ibid, page 102

²⁷⁵ Ibid

²⁷⁶ Ibid, 104

5. RECOMMENDATIONS AND CONCLUSION

This paper has examined some of the conceptual issues surrounding the pay equity. Many countries worldwide have recently adopted the principle of equal pay for work of equal value, as to be applied in their laws, minimum wage fixing machinery, collective agreements or a combination of these methods. More than 20 countries have equal pay legislations and many covers gender equality in remuneration in those employment equality statutes.²⁷⁷

Seeing that what has above been discussed, only India still has Remuneration Act which enables it to regulate all matters concerning pay equity in order to bridge gender wage gap. As for Tanzania and South Africa, their government should enact and enforce legislation to guarantee the rights of women and men to equal pay for equal work or work of equal value. Enact and enforce equal opportunity laws, take positive action and ensure compliance by the public and private sectors through various means.²⁷⁸

The Beijing Platform for Action recommended for countries to adopt and implement laws against discrimination based on sex in the labour market, especially considering women workers, hiring and promotion, the extension of employment benefits and social security, and working conditions to them.²⁷⁹

There should also be elimination of discriminatory practices by employers and take appropriate measures in consideration of women's reproductive role and functions, such as the refutation of employment and dismissal due to pregnancy or breast-feeding, and take effective measures to ensure that pregnant women, women on maternity leave or women re-entering the labour market after childbearing are not discriminated against.²⁸⁰

Moreover government, non governmental organizations and other sectors should help formulate mechanisms and take positive action to enable women to gain access to full and equal participation in the formulation of policies and definition of structures through such bodies as ministries of finance and trade, economic commissions, economic

²⁷⁷ Hodges-Aberhard J, 'Recent Developments Concerning Equal pay for Work of Equal value, Annexes to an outline of recent development concerning equity issues', (ILO Geneva, 1997), at p. 36

²⁷⁸ Ibid

²⁷⁹ Ibid

²⁸⁰ Ibid

research institutes and other key agencies, as well as through their participation in appropriate international bodies in order to eliminate the gender gap on remuneration.²⁸¹

Women should also be given equal rights when it comes to all matters of equality especially wage with men where by the state should undertake legislation and administrative reforms on economic resources, including access to ownership and control over land and other forms of property, credit, natural resources and appropriate new technology²⁸², which will not help them rely on the formal sector for employment but rather create their own employment through the resource they will have.

The state should conduct reviews of national income and social security systems to eliminate any existing bias against women which causes the wage gap between male and female. In this case the government should also review and amend laws governing the operation of financial institutions to ensure that they provide services to women and men on an equal basis.²⁸³

Promote gender-sensitive policies and measures to empower women as equal partners with men in technical, managerial and entrepreneurial fields. Reform laws or enact national policies that support the establishment of labour laws to ensure the protection of all women workers, including safe work practices, the right to organize and access to justice.²⁸⁴

Comparable worth is likely to have a much larger potential scope to reduce the earnings gap than conventional equal segregation, while conventional equal pay measures are restricted to comparisons within the same job within the establishment.²⁸⁵

The vast differences in the legal and institutional arrangements that exist across countries in their wage determination mechanisms suggest that no one single best approach to comparable worth is likely to prevail. Rather than a *one-size-fits-all* approach,

²⁸¹ Fourth World Conference for Women, Beijing Platform for Action 1995, Beijing, China accessed at www.un.org/womenwatch/daw/beijing/platform

²⁸² Ibid

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Gunderson M, 'Comparable Worth and Gender Discrimination; An International Perspective' (ILO 1994). At p. 109

different procedures are likely to be necessary, tailored to particular wage-setting arrangements of the different countries.²⁸⁶

Virtually all the above discussed features discussed above mainly base on economic factors, it is the social factors which are missed in the economist's interpretation. The differentiation between the rates paid to men and women in the same employment lends itself as a prime example to this theory. The attitude to women in most societies is highly hesitant. On one hand the tradition of loyalty and perceptions about their fairly make women the object of much formal respect, but on the other hand, in the workplace the assumption that women should normally occupy the humbler positions is strongly unshakable.²⁸⁷

Women, who managed to rise to higher levels within an organization, tend to be gathered in certain activities, to the extent that certain activities within the organization or company are feminized.²⁸⁸ An example of this is the large number of female personnel and human resource managers. The fact that the organizational structure of corporations are such that a career path in human resource management is less likely to lead directly to the top than other strategic areas such as product development or corporate finance only serves to amplify the problem facing women.²⁸⁹

In my opinion, pay equity requires more long term than short term plans. An example of these areas includes education and training for women. Education has been said to be the key to opening up the minds of human beings and should be used extensively to help eradicate beliefs hindering the recognition of women as deserving, such as the identification of skilled work with masculinity and unskilled work with femininity.²⁹⁰

In the workplace and labour market generally, the achievement of pay equity would also require, ample mechanisms which locate pay inequality within the mainstream of

²⁸⁶ Gunderson M, at p 110

²⁸⁷ Mworio N, *A comparative study of gender based pay equity implementation: Lesson for South Africa*, (1999) LLM Dissertation, University of Cape Town, at p 57

²⁸⁸ Ibid

²⁸⁹ Ibid, at p 57

²⁹⁰ Acker J, *Doing Comparable Worth- Gender, Class and Pay Equity*: Temple University Press, Philadelphia 1989, at p 194

labour relations, an overhaul of the behaviour patterns of the institutions involved.²⁹¹ This would not by any means be an easy task for any country, not least South Africa, but perhaps one well worth the effort.

Gender issues engrave all spheres of society economic, social, political and cultural. Different approaches to promote full and equal participation of women and men require a holistic approach. Interrelated problems cannot be tackled by sectoral solutions.²⁹² Gender issues have so far been mainly addressed through different departmental policies, for example by supporting micro- enterprises or targeting social welfare measures to women, but gender analysis has permeated less the domain of macroeconomic policy.²⁹³ Macroeconomic policies such as changes in fiscal policy, trade liberalization and deregulation and structural adjustment programmes have mostly been gender blind. More need to be done to mainstream gender concern in high level policy.²⁹⁴

More attention needs to be paid to both realistic and deliberate needs of women. Workplace and labour market participation is not only a means of earning a living and economic independence, but an essential part of women's self- awareness and sense of identity. Different societies today work collectively as the most important social network. The link between the social and economic value of work and the conditions under which it is performed is at the heart of a strategy promoting decent work.²⁹⁵

Pay equity is not only the matter of ensuring only that those female employees who do the same or broadly the same work as the male employees should be remunerated equally but it also concerns with the concept which forces employers to challenge assumptions made in the past about women and the work they are thought to perform best. It is also about the value which attaches or ought to attach to that work.²⁹⁶

²⁹¹ Stackpoole-Moore J, 'From Equal Pay to Equal Value in Australia: Myth or Reality'? (1989) 11 *Comparable Law Journal* 273

²⁹² Thompson J, *Pay Discrimination : revisiting the concept and international perspectives*, (1998) LLM Dissertation, University of Cape Town

²⁹³ Ibid

²⁹⁴ Ibid

²⁹⁵ Mworira, op. cit

²⁹⁶ Thompson J, Op. cit

Equal pay claims also impact on the labour market. It remains to be seen to what extent South African labour courts will permit market forces to dominate in what is ultimately a balancing exercise between those forces and pressures for equity in employment.²⁹⁷

As a result in concluding, it is perhaps worth noting that the goal of the “equal pay for work of equal value” principle is to make visible and to equitably reward the previously veiled skills demanded in many jobs dominated by women. What should not be forgotten is that it is not an error that keeps these skills unseen but it is the industrial and societal customs and norms that are deeply ingrained and which will be in place for centuries. The danger is that these attitudes will in turn be carried into other coming generations.²⁹⁸

Pay equity concept is conceivably not designed to eliminate at once the entire wage gap as many thought so, rather it should be designed to reduce that part of the gender wage gap that is attributable to the systematic undervaluation of women’s work.²⁹⁹

²⁹⁷ Van Niekerk A, Equality Rights and the new Act, Current Labour Law 1995, at p 94

²⁹⁸ Mworio N, *A comparative study of gender based pay equity implementation: Lesson for South Africa*, (1999) LLM Dissertation, University of Cape Town, p 57

²⁹⁹ Ibid, at p 58

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